82-1248

No. -

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1982

ELLEN SCHALL, as Commissioner of the New York City Department of Juvenile Justice,

Appellant,

and

ROBERT ABRAMS, as Attorney General of the State of New York,

Intervenor-Appellant,

against

GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, and all others similarly situated,

Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

APPENDICES TO JURISDICTIONAL STATEMENTS FOR APPELLANT AND INTERVENOR-APPELLANT

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APPENDIX A

Opinions and Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 526, 706—August Term, 1981

(Argued January 12, 1982 Decided September 20, 1982)

Docket Nos. 81-2175, 81-2193

GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, and all others similarly situated,

Petitioners-Appellees,

—v.—

PAUL STRASBURG, as Commissioner of the New York City Department of Juvenile Justice,

Respondent-Appellant,

ROBERT ABRAMS, as Attorney General of the State of New York,

Intervenor-Appellant.[†]

Before:

OAKES, NEWMAN and WINTER,

Circuit Judges.

[†] Text of opinion includes corrections made by the Court of Appeals as of January 1, 1983.—*Ed.*

Appendix A

Appeal from a judgment of the United States District Court for the Southern District of New York (Carter, *Judge*), declaring New York Family Court Act § 739(a)(ii) unconstitutional.

Affirmed.

JUDITH A. GORDON, Assistant Attorney General (Robert Abrams, Attorney General of the State of New York, George D. Zuckerman, Assistant Solicitor General, Florence E. Abrams, Assistant Attorney General, New York, New York), *for Intervenor-Appellant.*

MARTIN GUGGENHEIM, New York, New York (Bruce J. Ennis, American Civil Liberties Union, New York, New York), *for Petitioners-Appellees.*

LENORE GITTIS, New York, New York (Janet R. Fink, Charles A. Hollander, The Legal Aid Society, New York, New York), *for Petitioners-Appellees.*

WINTER, *Circuit Judge:*

This appeal involves a constitutional challenge to a provision of the New York Family Court Act[1] authorizing pre-

1. The New York Family Court Act has been codified at Book 29A, Part I, Judiciary—Court Acts (McKinney 1975 Supp. 1981). References to the Family Court Act will be cited as "FCA § ——." The preventive detention statute challenged in this action is FCA § 739(a), which provides:

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ventive detention of accused juvenile delinquents. It was brought in the District Court as a habeas corpus class action against the defendant Paul Strasburg, Commissioner of the New York City Department of Juvenile Justice, under 28 U.S.C. § 2254, Robert Abrams, Attorney General of the State of New York, intervening as a defendant. Judge Carter certified the class as "all juveniles who are now being held or will be held before these proceedings are concluded, in pretrial detention . . .," under the challenged statute. A trial resulted in a record of documentary and testimonial evidence about the actual practice of the Family Court in utilizing preventive detention, including expert testimony by a Family Court Judge, statistical studies and a collection of representative case studies.

Judge Carter held the statute unconstitutional. 513 F. Supp. 691 (S.D.N.Y. 1981). He issued a judgment granting the writ to all juveniles detained under the challenged provisions at any time before conclusion of this action. Defendants appealed. We affirm on the grounds that the statutory scheme and practice under it violate the Due Process Clause of the Fourteenth Amendment in that the period of pre-trial detention is utilized principally to impose punishment before adjudication of the alleged criminal acts.

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§ 739. *Release or detention after filing of petition and prior to order of disposition.*

(a) After the filing of a petition under section seven hundred thirty-one or seven hundred thirty-two, the court in its discretion may release the respondent or direct his detention. In exercising its discretion under this section, the court shall not direct detention unless it finds and states the facts and reasons for so finding that unless the respondent is detained:

(i) there is a substantial probability that he will not appear in court on the return date; or

(ii) there is a serious risk that he may before the return date do an act which if committed by an adult would constitute a crime.

Appendix A

THE STATUTORY SCHEME SUMMARIZED

Since our decision rests on a belief that the Family Court Act does not accord procedural due process, it is important to understand the procedural structure of New York delinquency adjudications. Although these juvenile proceedings are somewhat different from adult criminal proceedings in both ends and means, their major procedural stages have analogues in the adult criminal justice process. A juvenile proceeding is initiated by a petition for delinquency,[2] a step analogous to an indictment. The case then goes to fact-finding before a Family Court Judge, at which time the juvenile is either adjudicated a delinquent or the petition is dismissed.[3] The analogue in the criminal law is, of course, the trial and verdict. The final stage is a determination of the disposition by a Family Court Judge,[4] analogous in the criminal law to adult sentencing. We set out these analogues, not to argue that the constitutional limitations on juvenile courts are identical to those imposed on adult criminal tribunals, but solely to facilitate an understanding of the result we reach.

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2. FCA § 731 prescribes the function and content of a delinquency petition:

> 1. A proceeding to adjudicate a person a juvenile delinquent is originated by the filing of a petition, alleging:
>
> (a) the respondent did any act which, if done by an adult, would constitute a crime and specifying the act and the time and place of its commission;
>
> (b) the respondent was a person under sixteen years of age at the time of the alleged act; and
>
> (c) the respondent requires supervision, treatment, or confinement.

3. *See* FCA §§ 744, 752.

4. *See* FCA § 753.

Appendix A

The statutory scheme can be summarized as follows. The challenged provision is Section 739(a)(ii). It authorizes detention of a juvenile after filing of a petition, but before fact-finding, when a Family Court Judge determines "there is a serious risk that [the juvenile] may before the return date do an act which if committed by an adult would constitute a crime." Juveniles detained under 739(a)(ii) are entitled to a probable cause hearing within three to six days and an expedited fact-finding hearing.[5] If delinquency is adjudicated at fact-finding, a probation investigation and, in the case of "designated felony acts,"[6] a

5. FCA § 747 mandates that, if the respondent is in detention, a fact-finding hearing shall commence, unless adjourned, not more than three days after the filing of the petition against the respondent unless the respondent is charged with an act which if committed by an adult would constitute a Class A, B or C felony, in which case the fact-finding hearing shall commence within fourteen days. FCA § 739(b) provides that the respondent may not be detained more than three days, barring waiver or adjournment, unless the court finds probable cause. However, under "special circumstances," a juvenile may be detained for as long as six days without a probable cause determination having been made.

6. A "designated felony act" is defined in FCA § 712(h) to include the following offenses:

> (h) "Designated felony act". An act which, if done by an adult, would be a crime (i) defined in section 125.27 (murder in the first degree); 125.25 (murder in the second degree); 135.25 (kidnapping in the first degree); or 150.20 (arson in the first degree); 130.70 (aggravated sexual abuse); 135.20 (kidnapping or fifteen years of age; (ii) defined in section 120.10 (assault in the first degree); 125.20 (manslaughter in the first degree); 130.35 (rape in the first degree); 130.50 (sodomy in the first degree); 130.70 (aggravated sexual abuse); 135.20 (kidnapping in the second degree), but only where the abduction involved the use or threat of use of deadly physical force; 150.15 (arson in the second degree); or 160.15 (robbery in the first degree) of the penal law committed by a person thirteen, fourteen, or fif-

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diagnostic assessment[7] precede the dispositional hearing. The Family Court Judge can choose among several alternative dispositions, including suspension of judgment,[8] probation,[9] placement at home or with other individuals,[10] placement in a facility or school where treatment is available[11] or restrictive placement (incarceration).[12] The statutory criteria for determining the appropriate disposition emphasize the needs and best interests of the juvenile, the information provided by the probation investigation

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teen years of age; (iii) defined in the penal law as an attempt to commit murder in the first or second degree or kidnapping in the first degree committed by a person thirteen, fourteen or fifteen years of age; (iv) defined in section 140.30 (burglary in the first degree); subdivision one of section 140.25 (burglary in the second degree); or subdivision two of section 160.10 (robbery in the second degree) of the penal law committed by a person fourteen or fifteen years of age; (v) defined in section 120.05 (assault in the second degree) or 160.10 (robbery in the second degree) of the penal law committed by a person fourteen or fifteen years of age but only where there has been a prior finding by a court that such person has previously committed an act which, if committed by an adult, would be the crime of assault in the second degree, robbery in the second degree or any designated felony act specified in clause (i), (ii) or (iii) of this subdivision regardless of the age of such person at the time of the commission of the prior act; or (vi) other than a misdemeanor, committed by a person at least seven but less than sixteen years of age, but only where there has [sic] been two prior findings by the court that such person has committed a prior act which, if committed by an adult would be a felony.

7. *See* FCA § 750(3).

8. FCA § 755.

9. FCA § 757.

10. FCA § 756(a)(i).

11. FCA § 756(a)(ii), (iii).

12. FCA § 753-a.

and diagnostic assessment, the character of the offense and the need for protection of the community.[13] Some alternatives, however, are foreclosed or available only on a limited basis. The Family Court Judge has no option to transfer the juvenile to an adult criminal tribunal. In addition, placement in a treatment facility turns upon the availability of space and the consent of the particular facility.[14] Even though a Family Court Judge may determine that placement for treatment is the appropriate disposition, therefore, the actual options in a particular case may be limited to probation or incarceration.

The statutory scheme thus contains facial incongruities. Preventive detention is authorized solely upon a finding that a juvenile may do an act in the interim between the petition and fact-finding which would be a crime if done by an adult. The potential crimes are not limited to felonies or violent crimes but include every act which constitutes a crime under the New York Penal Law.[15] The statute itself

13. *See generally* FCA §§ 711, 753-a(2).

14. *See* note 30, *infra; Cf.* P. Prescott, *The Child Savers*, 197 (1981).

15. The term "crime" is defined in New York Penal Law § 10.00(6) as any felony or misdemeanor. Thus, offenses such as playing three-card monte can, and, as the record reveals, sometimes do trigger the sanction of 739(a)(ii). This is in contrast to the District of Columbia pretrial detention statute, D.C. Code 1973, § 23-1322, upheld in *United States v. Edwards*, 430 A.2d 1321 (D.C. App. 1981), under which a suspect may be detained for up to 60 days pending trial only if that suspect has been charged with the commission of a "dangerous crime" (*i.e.*, taking or attempting to take property from another by force or threat of force, unlawfully entering or attempting to enter any premises adapted for overnight accommodation of persons or for carrying on business with the intent to com-

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offers no procedural safeguards and does not set out substantive criteria, other than the conclusory "serious risk" test, such as prior court contacts or lack of family supervision, to limit which accused juveniles may be detained.[16] At disposition, on the other hand, elaborate statutory provision is made for collecting diagnostic and other information, and specific criteria are established to guide the Family Court Judge.[17]

THE STATUTORY SCHEME IN PRACTICE

The incongruities of the statutory scheme yield a paradoxical result in practice. The parties have waged a battle of statistics regarding the actual disposition of cases involving juveniles detained under 739(a)(ii).[18] However,

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mit an offense therein, arson or attempted arson of any premises adaptable for overnight accommodation of persons or for carrying on business, forcible rape, or unlawful sale or distribution of narcotics) or a "crime of violence" (*i.e.*, murder, forcible rape, carnal knowledge of a female under the age of 16, taking or attempting to take immoral, improper or indecent liberties with a child under the age of 16, mayhem, kidnapping, robbery, burglary, voluntary manslaughter, extortion or blackmail accompanied by threats of violence, arson, assault with intent to commit any offense, assault with a dangerous weapon, or an attempt or conspiracy to commit any of the foregoing offenses as defined by any Act of Congress or any State law, if the offense is punishable by imprisonment for more than one year). Moreover, the judicial officer ordering preventive detention must find a substantial probability that the suspect committed that offense prior to the imposition of pre-trial detention. *Id.* § 23-1322 (b)(2)(C).

16. The case histories in the record reveal instances of detention under 739(a)(ii) of first offenders.

17. *See* note 7, *supra*.

18. The record contains statistical compilations utilized by the parties to dispute the number of 739(a)(ii) detainees released at or

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one critical fact has been established—the vast majority of juveniles detained under 739(a)(ii) either have their petitions dismissed before an adjudication of delinquency or are released after adjudication. Of the representative case studies submitted as evidence, for example, the defendants' version of events indicates that well over two-thirds of the

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before disposition. These include a monograph prepared by the Vera Institute of Justice and Court Administration Reports for the years 1977 and 1979. None of the data, apart from the representative case histories, allow a precise comparison of detained juveniles restrictively placed and released at disposition. The Vera Study, based on New York City juveniles, lumps detentions under 739(a)(ii) with detentions under 739(a)(i), while the Court Administration Reports, based on statewide data, suffer from that same imprecision but also do not indicate how many restrictively placed juveniles were ever detained. The Vera Study, relied upon by petitioners, indicates that of the detained juveniles, 49% have their cases dismissed before trial, 21% are dismissed or released after trial, and only 30% are restrictively placed. The Vera Study also demonstrates that, although one-third of the delinquency petitions filed results in pre-trial detention, only 11% of all petitions results in restrictive placements. Since the detainees include those held under (i) as well as (ii), it is not conclusive for our purposes. The defendants, on the other hand, apply a factor derived from the Vera Study's sample of placed juveniles who were not detainees to data reflecting total restrictive placements contained in the Court Administration Reports. From that, they estimate that slightly less than 50% of the juveniles detained under 739(a)(ii) are not placed at disposition. Neither position can be relied upon for total accuracy. The defendants' position, however, is the least reliable. It not only suffers from the overinclusiveness of both studies but also attempts to combine selected data from a study based on New York City with selected data from statewide statistics.

We find that the case studies and the Vera Study established that the great majority of detainees under 739(a)(ii) are released before or at disposition. Although the defendants have superior access to generalized statistics and at least an equal opportunity to present a countersample of case studies, they choose to rely solely upon the most vulnerable data in the record. Even that data, however, indicates that close to half of all (ii) detainees are quickly released.

juveniles held under 739(a)(ii) were released at or before the dispositional hearing.[19]

The result in practice is that the vast majority of juveniles considered sufficiently dangerous by the Family Court to justify pre-trial incarceration under 739(a)(ii) are in fact released by prosecutors or by the Family Court within days or weeks. Defendants attribute this peculiar result to the statutory incongruities described above. Detention decisions under 739(a)(ii) emphasize crime prevention and are made on the basis of limited information presented in summary fashion. Dispositional determinations, on the other hand, take the juvenile's welfare and potential for treatment into account and are based on more detailed and extensive information.

The defendants offered expert testimony by a Family Court Judge concerning the actual practice under the statutory scheme.[20] He testified that the detention hearing under 739(a)(ii) usually involves only the Family Court Judge, a prosecutor, a Court Liaison Officer, the juvenile,

19. The representatives of the thirty-four case histories in the record is not challenged by the defendants. Adopting the defendants' version of these histories, final dispositions are known for thirty-two of the juveniles. The petition of delinquency and results of fact-finding of one juvenile were not offered for admission into evidence and the record of another juvenile reflects only that he was paroled pending receipt of certain investigation materials. The vast majority of that sample, twenty-three of the juveniles, or 70%, were released at or before disposition stage. Twelve of these cases resulted either in a dismissal, withdrawal or adjournment in contemplation of dismissal before fact-finding; the remaining eleven resulted in either probation or a suspended sentence.

20. Testimony of Judge Cesar Quinones, Transcript of Trial Proceedings, pp. 435-513; Joint App. at 521-99.

his or her attorney, and the parents or their representative.[21] It takes place soon after the arrest and a stenographic record is kept. In the typical case, the evidence before the Judge is limited to: (a) the petition for delinquency and an affidavit by a witness stating the petition is accurate; (b) a recommendation by the Court Liaison Officer to detain or release the juvenile based on inquiries and recommendations made by a probation officer who is usually not present; (c) statements by the juvenile or his or her attorney and by the parents or other persons accompanying the juvenile.[22]

The Family Court Judge testified that the criteria utilized in practice under 739(a)(ii) emphasize matters going solely to the protection of the community. These include prior record, recent court contacts, seriousness of the charge, and adequacy of supervision.[23] He emphasized that the criteria do not include the interests of the child and often result in confinement under circumstances harmful to the juvenile.[24] The same witness testified that the

21. *Id.* at 477; Joint App. at 533.

22. *Id.* at 463; Joint App. at 549.

23. *Id.* at 465-68; Joint App. at 551-54.

24. Judge Quinones testified about the purpose of 739(a)(ii) detention and emphasized that such detention may be harmful to the juvenile:

> Q. [by Ms. Gordon] Judge, what is your opinion of the purpose of the dention that Section 739(a)(2) [sic] authorizes?
>
> * * * *
>
> A. [by Judge Quinones] I believe that the purpose of 739(a) is really the protection of the community. I believe that's the basic purpose for that provision.
>
> Q. If that statute serves the interest of the child at all, in what sense does it serve the child's interest, if you have an opinion?
>
> A. If it serves the child's interest at all, it would be the minimal benefit that while he is in detention, he is not committing another

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factors taken into account at the dispositional hearing differ substantially from those utilized at the 739(a)(ii) hearing. At disposition, the best interests of the child are the principal concern and further detention is regarded as a "harsh solution."[25] Moreover, considerably more infor-

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crime; if that can be called a benefit to the youngster, but I don't believe that detention is actually for the benefit of the youngster, not under this statute.

I certainly would not remand anybody for benefit. Perhaps you might find a rare case where somebody might be so favorably or so shockingly effected by a short stay in juvenile center that that might turn him around, but I don't believe that is the purpose he is put there, no. You put them in for their own good, I'm sorry.

Q. Are there any disadvantages or bad effects from the detention or the pre-trial detention of a juvenile in your opinion?

A. Yes.

Q. What are they?

A. In my opinion, all defenses [sic: detentions], juvenile or adult, can have bad effects. For one thing, we are talking about youngsters of tender age. You are taking them away from their family. I mean, that's bound to have a psychological . . . detrimental effect on them.

Id. at 479-80; Joint App. at 565-66.

25. Judge Quinones testified about the standards in dispensing punishment at disposition, as follows:

Q. [by Mr. Guggenheim] How can you account, Judge, for the fact in a case where the initial reaction of the court is to detain a child based on a prediction that he will commit another crime or crimes if not detained with an ultimate disposition in the case of probation?

A. [by Judge Quinones] Probation indicates that there has been a finding in the case. You have to have a fact-finding otherwise probation wouldn't be discussed.

Now, when it comes to the dispositional hearing, the main purpose of the dispositional hearing or the main thrust would be the best interest of the child. In a dispositional hearing you are supposed to keep the child's best interest at heart and I think

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mation about the child is before the Family Court Judge at the dispositional hearing than is available at the 739(a)(ii) hearing. Not only is the information more complete and up-to-date, but psychological assessments are also provided.[26]

Two other facts influence the lenient disposition of adjudicated delinquents. First, as the evidence of the defendants demonstrated[27] and as they emphasized at oral argument,[28] the time served, including the preventive detention period, is frequently considered sufficient punishment by the Family Court. Juveniles detained under 739(a)(ii) may be held in a secure facility and exposed to

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that—well, speaking for myself, I think that any kind of detention at a dispositional hearing is a very harsh solution to the problem and you will look for the least harmful or to the most beneficial disposition at dispositional hearing keeping the best interest of the child in mind and many times that is probation.

Id. at 505-06; Joint App. at 591-92.

26. *Id.* at 506-07; Joint App. at 592-93.

27. On redirect examination, Judge Quinones added:

Q. [by Ms. Gordon] At the dispositional hearing, Judge Quinones, do you take account of the fact that a child who has been previously remanded has already spent some time in a restrictive environment in coming to your disposition?

A. [by Judge Quinones] Yes, that is taken into consideration also.

Id. at 507; Joint App. at 593.

28. At oral argument before this Court on January 12, 1982, counsel for the defendants argued:

One of those decisions commonly made by a judge is that if a person has been detained, even in lieu of bail, that the person has done sufficient jail time, to use that term loosely. Accordingly, to say that a Family Court Judge who issues a disposition three months, six months later to a child who has been detained, may simply be a statement that the child has already done enough time.

Verbatim Transcript of Oral Argument, January 12, 1982, p. 21.

assault and criminal subcultures.[29] Family Court Judges who consider detention "harsh" in the first place and not in the juvenile's interests, will understandably give great weight to prior confinement.

Second, as already noted, placement in a treatment facility, an intermediate disposition between probation and incarceration, is feasible only when a treatment facility has space and agrees to accept the child. In some cases, therefore, the Family Court Judge may face a choice between a disposition regarded as too lenient and another regarded as too harsh. The former may then be chosen as more likely to further the best interests of the child. The practical inability to provide placement in a treatment facility for criminally inclined juveniles has led to public expressions of frustration by Family Court Judges in response to criticisms of lenient dispositions.[30]

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29. Judge Quinones noted in his discussion of the harmful effects of pre-trial detention the detriment accompanying detention in a secure facility:

> A. [by Judge Quinones] Then again, juvenile center, as much as we might try, is not the most pleasant place in the world. If you put them in detention, you are liable to be exposing these youngsters to all sorts of things. They are liable to be exposed to assault, they are liable to be exposed to sexual assaults. You are taking the risk of putting them together with a youngster that might be much worse than they possibly might be and it might have a bad effect in that respect.

Transcript of Trial Proceedings at 480; Joint App. at 566.

30. Judge Edward J. McLaughlin, the Chairman of the Association of New York State Family Court Judges, stated recently:

> In adjudicating issues involving alleged delinquents, the Legislature provided that there be two trials. The first, known as a fact-finding hearing, would be conducted essentially under the due process rules of a criminal proceeding. If the facts were proven beyond a reasonable doubt, the court was obliged to conduct a second trial to determine whether the delinquent was in need of treatment and, further, whether treatment was available.

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Appendix A

Prosecutors take into account judicial attitudes in the juvenile analogue to plea bargaining, and the dismissal rate is accelerated in the anticipation that particular juveniles will be released even if adjudicated delinquent. The record indicates that a large percentage of juveniles detained under 739(a)(ii) in fact have their petition dismissed before fact-finding. Of the case studies, the defendants' version indicates that over one-third were released under such circumstances.[31]

The net result of this combination of statutory language and conscious judicial practice thus is that by far the greater number of juveniles incarcerated under 739(a)(ii) will never be confined as a consequence of a disposition imposed after an adjudication of delinquency, the usual course of events being either a dismissal before adjudication or release upon a post-adjudication dispositional hearing.[32]

It is the requirement regarding the availability of treatment that exposes the court to its greatest public criticism. The Legislature did not permit the judge to punish the delinquent. Neither is the judge allowed to compel any institution to accept the delinquent for treatment: the treatment facility determines whether help is available.

This mandate led to the most glaring dissatisfaction with the court, since it is the delinquent most in need of help—the sickest, if you will—who is the least likely to be found eligible for treatment by any existing facility. The situation thus created resembles the case of a terminally ill patient who is not accepted into a hospital, not because he doesn't need treatment but because no treatment is available.

N.Y. Times, March 15, 1982, p. A16, col. 3.

31. *See* note 20, *supra*.

32. Part of the detention period for some of these juveniles is between fact-finding and disposition and thus occurs after an adjudication of the alleged criminal acts. The testimony was that in the usual course of events, those juveniles detained under 739(a)(ii) will continue to be held once adjudicated while those not held in the pre-trial period will continue to be free pending disposition.

Appendix A

DISCUSSION

The presumption of innocence and the requirement that guilt be proven beyond a reasonable doubt are important elements of Due Process itself, *In re Winship*, 397 U.S. 358 (1970), which would be gravely diminished in the protection they afford if individuals can be routinely incarcerated pending trial. Even the most persuasive demonstration of innocence cannot prevent the deprivation of liberty if incarceration precedes, rather than follows, the adjudication of criminal liability.

The only exceptions presently recognized to this general rule appear to be brief detentions pending bail hearings, detention for failure to post bail subject to the Eighth Amendment's prohibition on "excessive" bail, or in limited classes of cases, denial or revocation of bail. *See generally* C. Whitebread, *Criminal Procedure* §§ 17.01-17.03 (1980).

The extent to which exceptions other than those relating to bail may be carved out is not clear. We believe all would agree, however, that any exception to the general rule that incarceration follow, rather than precede, adjudications of guilt can be justified, if at all, by a compelling governmental interest. *Cf. Gerstein v. Pugh*, 420 U.S. 103 (1975). The defendants argue, in the case of 739(a)(ii), that crime prevention is such an interest. That statute ostensibly responds to calls for preventive detention to protect the community from criminally inclined individuals. As conceived by its proponents, preventive detention is a method of confining inherently dangerous individuals accused of crimes pending trial and sentence of confine-

ment. *See* Note, *Preventive Detention Before Trial*, 79 Harv. L. Rev. 1489, 1496-98 (1966). The underlying theory is not that propensity alone justifies confinement but that the expectation of an adjudication of guilt and subsequent sentence of confinement, along with a finding of propensity, justifies protecting the community from the individual in the interim period. Hruska, *Preventive Detention: The Constitution and the Congress*, 3 Creighton L. Rev. 36, 46 (1969). Such a scheme raises serious constitutional questions which the parties have asked us to address. We decline, however, to reach those issues because 739(a)(ii) is utilized principally, not for preventive purposes, but to impose punishment for unadjudicated criminal acts.

Crime prevention simply does not provide a justification for the detention of the vast majority of juveniles actually held under 739(a)(ii). Family Court Judges, we are told, release large numbers of detainees at disposition because much more information pertaining to the particular juvenile is available there than at the detention stage and because the Judges tend to find that the time already served is punishment enough. While the record is silent as to explanations for the similarly large number of prosecutorial dismissals before adjudication, it can be inferred that such cases as a class involve facts even less compelling as to guilt or appropriateness of further incarceration.

Accepting the defendants' view, the vast majority, in all likelihood over two-thirds, of the 739(a)(ii) detainees fall into one or more of the following categories: (1) those against whom the evidence of guilt is weak or insufficient; (2) those who are not so dangerous that they cannot be

released after a short period of detention; and (3) those who are regarded as having served enough time in confinement. Crime prevention is not a sufficiently compelling governmental interest as to any of these detainees to justify shortcutting the fundamental procedural requirement that imprisonment follow, rather than precede, adjudication. Category (1) involves detainees ultimately released by prosecutorial dismissal or on a judicial finding of insufficient evidence. As to them, incarceration is imposed but guilt is never adjudicated. Category (2) involves detainees about whom a mistaken judgment was made in the course of the summary hearing held under 739(a)(ii). As to them, no constitutional purpose justifies their detention. Category (3) involves adjudicated delinquents considered to have been punished enough by the time served. No compelling governmental interest justifies the imposition of sanctions on members of this group before, rather than after, adjudication. As to them, detention serves the purpose of punishment rather than crime prevention, since early release—within days or at most a few weeks—by a Family Court Judge contradicts any asserted need for pre-trial confinement to protect the community.[33]

In practice, therefore, the vast majority of the pre-trial detentions involve either mistakes in judgment fostered by 739(a)(ii)'s procedurally and substantively unlimited terms or the imposition of incarceration solely as punish-

33. The state defendants have not contended, and the record contains no evidence, that the period between arrest and disposition entails a greater risk of criminal acts by juveniles than the post-disposition period.

ment for unadjudicated crimes. To the degree that the goal of crime prevention is implicated at all in the actual operation of 739(a)(ii), it is only as to the minority, perhaps less than one-third, of the juveniles actually detained under its provisions. As to this group, moreover, only the risk that some might commit crimes is eliminated.

In re Winship, supra, directly ruled that an adjudication of delinquency which entails the possibility of institutional confinement must rest on proof beyond a reasonable doubt, because such confinement is constitutionally analogous to punishment for criminal acts. The provision invalidated in *Winship* under the Due Process Clause was in fact a provision of the New York Family Court Act which applied a preponderance of the evidence test in delinquency adjudications. The practice under 739(a)(ii) is, if anything, more offensive since confinement is imposed initially only upon a verified petition and later at best upon a finding of probable cause.[34] The Family Court Judge ordering detention is well aware that most detainees will either not go to fact-finding or, if they do, will be released on probation. Section 739(a)(ii) thus incarcerates—punishes—large numbers of persons upon a standard of proof which is constitutionally invalid and which cannot be justified in the name of crime prevention.

Section 739(a)(ii) thus has an unconstitutional impact as to the vast majority of the juveniles detained under it. We must now determine whether the statute is invalid as

34. Although in practice the Family Court requires a verified petition in 739(a)(ii) proceedings, the statute itself does not make likelihood of guilt a condition precedent to detention. A probable cause hearing, analogous in all relevant respects to an arraignment, is held within three to six days after a decision to detain.

to all juveniles or whether individual detainees must litigate the particular circumstances of their confinement.

We hold 739(a)(ii) unconstitutional as to all juveniles. The preponderant number of persons affected by its terms suffer punishment without adjudication of guilt beyond a reasonable doubt and absent a compelling governmental interest. Individual litigation, however, is a practical impossibility because the periods of detention are so short that the litigation is mooted before the merits are determined. Moreover, the record clearly demonstrates that the unconstitutional impact of the statute results directly from its substantively and procedurally unlimited terms which cause Family Court Judges to incarcerate juveniles they know will be released before or at disposition. Whether we view the statutory scheme as commanding the results it in fact attains or as simply failing "to provide sufficiently clear guidance for police, prosecutors and the courts to enforce [it] in a manner . . . consistent with [the Due Process Clause]," *United States ex rel. Newsome v. Malcolm*, 492 F.2d 1166 (2d Cir. 1974) *aff'd sub nom. Lefkowitz v. Newsome*, 420 U.S. 283 (1975), matters not, for under either view it violates constitutional guarantees.[35]

35. Our view conflicts with that of New York's Court of Appeals, which has upheld 739(a)(ii) against constitutional attack. *People ex rel. Wayburn v. Schupf*, 39 N.Y.2d 682, 385 N.Y.S.2d 518 (1976). Although the burden of the Court's opinion was directed to a claim that differential treatment of juveniles and adults violated the Equal Protection Clause, it recognized that preventive detention under 739(a)(ii) is imposed upon large numbers of juveniles who are in fact released after the dispositional hearing. This was attributed to the superior information available at that stage to inform the Family Court Judge as to the proper disposition. The Court held this constitutionally insignificant. We disagree for the reasons stated.

Appendix A

Our decision is strictly limited to the precise issue before us. We hold only that pre-trial detention may not be imposed for anti-crime purposes pursuant to a substantively procedurally unlimited statutory authority when, in all likelihood, most detainees will either not be adjudicated guilty or will not be sentenced to confinement after an adjudication of guilt. In such circumstances, the detention period serves as punishment imposed without proof of guilt established according to the requisite constitutional standard. We intimate no view as to the constitutionality of preventive detention in other circumstances.

The sole remaining issue is the scope of the relief granted. Judge Carter allowed this habeas corpus action to proceed as a class action, certifying the class as "all juveniles who are now being held or will be held before these proceedings are concluded, in pretrial detention under § 739(a)(ii) . . . ." Appellants do not challenge this certification. His order, entered on June 1, 1981, provided that the writ be granted as to all members of that class, *i.e.*, those detained under 739(a)(ii) at any time before this action is concluded. Appellants challange the order on the grounds that it grants *in futuro* release to individuals whose incarceration begins only after entry of judgment in the District Court. Class actions are permissible in habeas corpus proceedings, *United States ex rel. Sero v. Preiser*, 506 F.2d 1115 (2d Cir. 1974), *cert. denied* 421 U.S. 921 (1975), and the writ is available to attack future confinement, *Peyton v. Rowe*, 391 U.S. 54 (1968). It is also clear, however, that the remedy of habeas corpus is directed to the unlawful custody of individuals, while

prospective relief against enforcement of an invalid statute must be obtained in an action for an injunction under 42 U.S.C. § 1983. *See Preiser v. Rodriguez*, 411 U.S. 475 (1973). The prospective effect of Judge Carter's order affects only those detained in custody while this action continues, not those who may be detained thereafter. We believe that the "in custody" language of 28 U.S.C. § 2254 does not require institution of repeated individual actions for each new detainee while an appeal from a judgment in a class action is being actively considered. The fact of potential custody is clearly present during the period of litigation, and the defendants are always free to seek a stay of any such order from the appellate court. The order below thus does not significantly expand use of the writ.[36]

Affirmed.

NEWMAN, *Circuit Judge*, concurring:

I concur in affirming the judgment holding unconstitutional New York's preventive detention law for accused juvenile delinquents, N.Y. Family Court Act § 739(a)(ii) (McKinney 1975), but my reasoning differs from that set forth in Judge Winter's thoughtful opinion for the Court. All members of the panel are in agreement that, even if

36. This issue is apparently contested only because the state defendants believe that however unconstitutional 739(a)(ii) may be, injunctive relief is unavailable because the only feasible defendants are Family Court Judges who are immune from suit under § 1983. Brief of Intervenor-Appellant, p. 85, note, p. 86, note. Relief from 739(a)(ii) is, in their view, available only through successive individual habeas corpus actions. However, we fail to see why a custodial official holding a juvenile under the authority of 739(a)(ii) is not subject to a Section 1983 action.

the Constitution permits preventive detention of those not yet found to have violated adult penal statutes or juvenile delinquency laws, this New York provision fails to comport with the requirements of the Due Process Clause of the Fourteenth Amendment. The majority concludes that section 739(a)(ii) denies liberty without due process because in the "vast majority" of instances where detention has been ordered either "mistakes in judgment" have been made concerning the finding of serious risk that the accused may commit a crime or the detention has been imposed "solely as punishment for unadjudicated crimes."[1] Slip op. ——, *supra*. The "mistakes in judgment" are said to be fostered by the statute's "procedurally and substantively unlimited terms," that is, the statute's grant of limitless discretion to Family Court judges making the detention decision has in fact led to an unacceptable number of mistaken decisions. These instances of detention imposed for the purpose of punishment are found to conflict directly with the constitutional requirement that punishment be imposed only after adjudication of guilt. *See In re Winship*, 397 U.S. 358 (1970). I am less certain than the majority that the record supports a conclusion of a significant number of instances where detention was im-

1. It is arguable that, with respect to those accused of crime, pretrial detention imposed solely for the purpose of preventing the commission of future crimes prior to trial is punishment. With respect to those *convicted* of crime, the imposition of added confinement, beyond the penalties for the specific offense, is nonetheless punishment despite the prospective purpose of preventing future harm. *Specht v. Patterson*, 386 U.S. 605, 608-09 (1967). The extension of that principle to those *accused* of crimes raises the broad issue of whether pretrial detention to prevent future crime is ever permissible, an issue that need not be faced in deciding this case. For purposes of this appeal, I am willing to assume that pretrial detention ordered for the purpose of preventing future crime serves a regulatory purpose.

posed either mistakenly or for purposes of punishment. Nevertheless, under traditional analysis of the requirements of the Due Process Clause, I am persuaded that New York's statute is unconstitutional because it permits liberty to be denied, prior to adjudication of guilt, in the exercise of unfettered discretion as to an issue of considerable uncertainty—likelihood of future criminal behavior. In short, the statute denies due process, in my judgment, not because it has been shown to yield an unacceptable number of mistaken or impermissible results, but simply because it needlessly creates an unacceptable risk of such results.

Traditional due process analysis requires consideration of three factors in determining the constitutional adequacy of procedures by which a governmental interest is advanced at the expense of an individual interest: (1) "the private interest that will be affected by the official action," (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

The private interest impaired by § 739(a)(ii) is personal liberty, obviously of fundamental importance. The power of arrest, subject to Fourth Amendment limitations, permits that interest to be impaired in advance of an adjudication of guilt, but not under procedures that fail to provide "sufficiently clear guidance for police, prosecu-

tors, and the courts" so that the Fourth Amendment is observed. *United States ex rel. Newsome v. Malcolm*, 492 F.2d 1166, 1174 (2d Cir. 1974). The precise private interest at issue in this case is personal liberty after arrest and before trial under circumstances where a court has already determined that there does not exist a substantial probability of flight.[2]

The governmental interest is the prevention of future crimes, obviously of great significance in general, but of high value in a particular case only to the extent that the pretrial detention of a person will prevent the commission of a crime that he would have committed if not detained, or will at least significantly reduce the risk of his committing such a crime. Of course, while detained the person will not commit an ordinary street crime against members of the public; the uncertainty in determining whether his pre-trial detention advances a governmental interest arises from the difficulty of predicting whether he would have committed a crime if not detained, or assessing at least the probability of his doing so. That difficulty requires consideration of the third due process factor, the risk of an erroneous deprivation and the probable value of safeguards.

The hazards of predicting human behavior are well known. They are not diminished when the issue is whether a person arrested for one crime will, in the interval prior to his trial, commit another crime. Presumably, the legislative judgment reflected in New York's statute rests primarily on

2. The juvenile may be detained if "there is a substantial probability that he will not appear in court on the return date." N.Y. Family Court Act § 739(a)(i) (McKinney 1975).

the traditional rationale for preventive detention: a person who has committed a crime may have a propensity for committing crimes, and the likelihood that an arrested person has in fact committed a crime may be a sufficient basis for including him in the class of those who are likely to commit other crimes. Perhaps, in addition, the legislature believed that some persons accused of crime may expect that they will be convicted and may estimate that they are unlikely to receive enhanced punishment for a crime committed prior to sentencing on the initial charge. Under the stress of apprehending punishment, they may mistakenly think they can with impunity commit a "free" crime.[3]

The spirited debate over preventive detention has focused primarily on whether the "propensity" rationale has sufficient validity to justify the risk of detaining some individuals after arrest who in fact would not have committed a crime if not detained prior to trial.[4] It is not necessary in this case to assess the ultimate issue whether

3. Since the challenged statute authorizes detention only on the basis of a prediction of commission of a future crime, it does not purport to rest on other rationales advanced in support of some juvenile detention statutes that concern protecting the juvenile from dangerous home conditions or assuring his availability for study or treatment. *See* Comment, *A Due Process Dilemma: Pretrial Detention in Juvenile Delinquency*, 11 John Marshall J. Prac. & Proc. 513 (1978); Note, *The Right to Bail and the Pre-"Trial" Detention of Juveniles Accused of "Crime,"* 18 Vand. L. Rev. 2096 (1965).

4. *Compare* Hruska, *Preventive Detention: The Constitution and the Congress*, 3 Creighton L. Rev. 36 (1969), and Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 Va. L. Rev. 1223 (1969), *with* Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 Va. L. Rev. 371 (1970), and Hickey, *Preventive Detention and the Crime of Being Dangerous*, 58 Geo. L.J. 287 (1969).

the Constitution prohibits pretrial detention on the basis of uncertain predictions of future criminal behavior. *See Sellers v. United States*, 89 S. Ct. 36, 38 (1968) (Chambers' opinion of Black, J., questioning whether dangerousness is "ever" a justifiable ground for denying bail). The far narrower issue here is whether the risk of an erroneous prediction about future crime is high and whether safeguards not included in section 739(a)(ii) would be of value. To state the issue is to answer it. The proponents of preventive detention doubtless assess the risk of erroneous determinations somewhat lower than do the opponents, but on the present state of knowledge concerning predictions of criminal behavior, only the foolhardy would deny that even with carefully circumscribed decisionmaking, a significant risk of erroneous perdiction remains.

New York's statute does not include readily available limitations that would reduce the risk of error. First, the statute places no limits on the crimes for which the person subject to detention has been arrested. Even the most ardent advocates of preventive detention do not claim that commission of any crime, no matter how minor, provides an adequate basis for predicting commission of a future crime. Second, the judge ordering detention is not required to make any evaluation of the degree of likelihood that the person committed the crime of which he is accused. The statute authorizes pretrial detention without a finding of probable cause.[5] Third, the judge is

5. *See Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) ("[T]he Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest."). Even if some standard of proof less than probable cause would suffice to justify detention for the three to six days prior to the probable cause hearing mandated for all pretrial detainees, *see* N.Y. Family Court Act § 739(b) (McKinney 1975), New York's preventive detention statute contains no standard at all.

not required to assess the individual's background; a juvenile with solid family support, no prior criminal record, and attending school or working is subject to preventive detention in the unfettered discretion of the Family Court judge, even when arrested for non-violent crimes. Fourth, the statute places no limits on the type of crimes that the judge believes the detained juvenile might commit if released. Though a legislature has broad power to proscribe a variety of conduct as criminal, it does not necessarily have equivalent power to authorize pretrial detention because of the risk that the detained person might commit any of the acts, no matter how minor, for which criminal penalties have been established. Fifth, the statute does not specify any standard of proof by which the judge must be persuaded of a serious risk of future crime.[6] In marked contrast to the limitations in the well-known District of Columbia preventive detention statute upheld in *United States v. Edwards*, 430 A.2d 1321 (D.C. App. 1981), the New York provision permits the judge to order detention of any juvenile accused of any crime whenever he determines that there is a "serious risk" of any future crime.[7]

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6. *Cf. Addington v. Texas*, 441 U.S. 418 (1979) (requiring standard of "clear and convincing" proof to justify civil commitment to a mental hospital); *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958) (emphasizing importance of burden of proof when liberty of criminal defendant is at stake).

7. Even the Nebraska constitutional provision mandating preventive detention, which was declared unconstitutional by the Eighth Circuit for lack of individualized decision-making applied only to those accused of three serious crimes, treason, murder, and aggravated sexual offenses, and then only "where the proof is evident or the presumption great." Neb. Const. art. I, § 9; *Hunt v. Roth*, 648 F.2d 1148 (8th Cir. 1981), *vacated as moot per curiam*, 102 S. Ct. 1181 (1982).

In my judgment, the Due Process Clause forbids the exercise of such unbridled discretion to inflict a deprivation as serious as loss of liberty in advance of trial on the basis of a highly uncertain prediction of future criminal behavior.[8]

For these reasons I concur in the affirmance of the judgment of the District Court.[†]

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8. The appellees' claim of a denial of liberty without procedural due process does not assert that the New York statute lacks such traditional procedural requirements as notice and hearing. Of the five deficiencies I have noted, only the absence of a specified burden of proof concerns the type of procedural device normally comprehended within the requirements of procedural due process. Yet all of the deficiencies are procedural in the sense that they augment the risk of erroneous fact-finding, which is the risk sought to be reduced by the procedural component of due process. *Cf. Carlson v. Landon*, 342 U.S. 524, 543 (1952) (upholding the Attorney General's authority to deny bail to a narrowly described class of aliens, prior to deportation hearings, because "the Attorney General is not left with untrammeled discretion as to bail" and must "justify his refusal of bail by reference to the legislative scheme").

[†] Filed September 20, 1982.—*Ed.*

APPENDIX B

June 1, 1981 District Court Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 6176 (RLC)

UNITED STATES OF AMERICA ex rel. GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, et al.,

Petitioners,

against

PAUL STRASBURG, as Commissioner, New York City Department of Juvenile Justice,

Respondent.

This action for *habeas corpus* and declaratory relief came on for trial before the Court, Honorable Robert L. Carter, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered, it is Ordered and Adjudged:

1. The New York Family Court Act Section 739 (a)(ii), is unconstitutional, both on its face and as applied, in that it contravenes the rights of petitioners and the class they represent to due process of law as guaranteed by the 14th Amendment to the Constitution of the United States.

Appendix B

2. The application for writs of *habeas corpus* for members of the petitioner class in the custody of respondent is granted and all class members in custody pursuant to Family Court Act Section 739 (a)(ii) shall be released forthwith.

/s/ ROBERT L. CARTER

ROBERT L. CARTER, U.S.D.J.

Dated: New York, New York
May 29, 1981

JUDGMENT ENTERED 6/1/81

/s/ RAYMOND F. BURGHARDT

Clerk

APPENDIX C

April 17, 1981 District Court Opinion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 6176 (RLC)

UNITED STATES OF AMERICA ex rel. GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, et al.,

Petitioners,

against

PAUL STRASBURG, as Commissioner, New York City Department of Juvenile Justice,

Respondent.

[APPEARANCES OMITTED IN PRINTING.]

CARTER, District Judge

OPINION

I

Statement of the Case

This habeas corpus class action proceeding is being brought on behalf of a class of all juveniles who are being held or who will be held before these proceedings are con-

cluded in pretrial detention under N.Y. Family Court Act § 739(a)(ii) (McKinney) ("the Act"). Petitioners seek a declaratory judgment that § 739(a)(ii) violates the due process and equal protection clauses of the 14th Amendment. The case was certified as a class action in an unpublished opinion dated April 3, 1978.

In New York persons between the ages of 7 and 16 accused of various acts which would be a crime if committed by an adult are subject to the exclusive jurisdiction of the family court to be prosecuted as juvenile delinquents.[1] In the exercise of its exclusive jurisdiction over juvenile delinquents, the family court is authorized under the Act to subject an alleged delinquent to pretrial detention prior to a probable cause or fact finding determination if it determines that "there is a serious risk that he may before the return date do an act which if committed by an adult would constitute a crime." § 739(ii) [sic]. The youth may also be detained because of the substantial probability that he will not appear on the return date 739 (a)(i), but this provision is not involved or challenged in this litigation.[2]

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1. For most serious crimes such as murder and arson, members of this group 13 years old and older may be prosecuted as juvenile offenders in the criminal court. N.Y. Penal Law § 10.00(18) (McKinney). This subclass, however, does not concern us.

2. N.Y. Family Court Act § 739 (McKinney) provides:

> (a) After the filing of a petition under section seven hundred thirty-one or seven hundred thirty-two, the court in its discretion may release the respondent or direct his detention. In exercising its discretion under this section, the court shall not direct detention unless it finds [sic: phrase omitted] that unless the respondent is detained:
>
> (i) there is a substantial probability that he will not appear in court on the return date; or

(footnote continued on next page)

Appendix C

A trial on the merits occurred in March, 1980. Edward Rodriguez, a 16 year old, Juan Santiago, a 15 year old, and Jerome Basnight, a 17 year old, representatives of the class, testified in person. In addition, the files of their proceedings in the family court along with the § 739 case histories of 33 other purported members of the class were introduced in evidence. One of the case histories concerns a Vincent Harris who was not detained and accordingly is not properly a member of the class. The Attorney General contends that Victor Melendez is not properly a member of the class since he was detained pursuant to § 739(a)(i). A reading of the files does not support that contention, however. At the § 739 hearing of Melendez, the judge paraphrased the language of both § 739(a)(i) and § 739(a)(ii) as grounds for Melendez' detention. Accordingly, we will count him as properly included in the class. However, Daryl Larkin, whose case history is included in the class was detained because, in the judge's view, there was "a grave chance" that he would not return to court. (Exhibit 9A). That is the basis for detention under § 739(a)(i). In his brief the attorney general states that Larkin was detained under both § 739(a)(i) and (ii), but I read the transcript differ-

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(ii) there is a serious risk that he may before the return date do an act which if committed by an adult would constitute a crime.

(b) Unless the respondent waives a determination that probable cause exists to believe that he is a juvenile delinquent or a person in need of supervision, no detention under this section may last more than three days (i) unless the court finds, pursuant to the evidentiary standards applicable to a hearing on a felony complaint in a criminal court, that such probable cause exists, or (ii) unless special circumstances exist, in which cases such detention may be extended not more than an additional three days exclusive of Saturdays, Sundays and public holidays.

ently. Larkin, therefore, will not be considered a member of the class. Thus, the case histories which will be studied are those of 3 named petitioners and 31 other members of the class.

In addition there was testimony concerning the family court process by Steven Hiltz, an attorney for 9 years in the juvenile rights division of the Legal Aid Society, and attorney-in-charge of its Manhattan office from 1976-1979, Hubert Benjamin, supervisor of probation in Bronx Family Court since 1968 and a probation officer for 30 years, and Judge Cesar Quinones, of the Family Court of the City of New York since 1970, who testified concerning § 739 hearings from a judge's perspective.

Michael Bigley, director of detention services of the New York State Division for Youth and Ralph E. Kelly, deputy commissioner of operations of New York City Department of Juvenile Justice, testified concerning secure and non-secure facilities and the functions of the state and city agencies in the housing of juveniles remanded after a § 739 hearing. Professor Leslie Wilkins, professor of criminal justice at the State University of New York at Albany, and Dr. Lynwood David Zinn, Director of Child Psychology at Michael Reese Hospital in Chicago, Illinois, and clinical assistant professor at the University of Chicago, testified as experts for petitioners concerning the harmful effects pretrial detention inflicts on the young and the arbitrariness and untrustworthiness of predictions that a juvenile will commit a crime in the future. Dr. Wilkins questioned whether any reasoned predictive determination to that effect could be made by a family court judge on the basis

of an intake interview and stated that the judge's subjective prognosis founded on such data would be roughly only 4% better than pure chance. Finally, Judge Margaret Driscoll of the Supreme Court of Connecticut and with 18 years on the bench testified about national juvenile standards and Connecticut procedures in respect of the pretrial detention of juveniles.

II

The § 739 Case Histories of the Named Plaintiffs and 31 Other Members of the Class

Edwin Rodriguez was arrested on December 12, 1977, and charged with arson and reckless endangerment (that he with other youths attempted to start a fire in a subway station). Rodriguez was 14 at the time and had no prior arrest record. He had a § 739 hearing on December 13, 1977, before Judge Ferrara. Probation recommended detention. He was detained on the grounds that he was charged with a serious act that occurred at 12:30 A.M., and he was not going to school. A fact finding hearing[3] was scheduled for December 15, but was adjourned to December 16. At the December 16 hearing, Rodriguez entered a plea to reckless endangerment and was released. He had been detained for a total of 3 days. At the dispositional

3. N.Y. Family Court Act § 742 (McKinney) defines "fact finding hearing" in a case of alleged juvenile delinquency as one "to determine whether the respondent did the act or acts alleged in the petition which, if done by an adult, would constitute a crime." N.Y. Family Court Act § 744 (McKinney) requires evidence to be limited to the competent, material and relevant and a finding that "respondent did the acts or acts alleged must be based on a preponderance of the evidence."

hearing[4] on June 23, 1978, Rodriguez was given 2 years probation and family counselling. There have been no subsequent court contacts. Rodriguez, as indicated, testified in person at the trial, and his § 739 case history is set out in Exhibit 12.

Juan Santiago, 12 years old with no prior court contact, was arrested on April 11, 1978, and charged with first degree assault on a 71 year old woman. The offense was alleged to have occurred at 6:00 P.M. on the street and to have resulted in injury to the woman. He was taken to Spofford (a secure facility)[5] where he was held until his § 739 hearing on April 12, before Judge Matthews. The court ordered him detained because of the seriousness of the offense and the condition of the alleged victim. A probable cause hearing was set for April 17. He had been detained for 6 days at the time of the probable cause hearing. Probable cause was found and the boy was detained at Spofford until his fact finding hearing on April 24, 1978. As a result of that hearing, he was adjudicated a delinquent

4. N.Y. Family Court Act § 743 (McKinney) defines a dispositional hearing in cases of alleged juvenile delinquency as one "to determine whether the respondent requires supervision, treatment or confinement."

5. There are two types of detention facilities—secure and non-secure. A secure facility is defined as one "characterized by physically restricting construction, hardware and procedures." N.Y. Family Court Act § 712(d) (McKinney). A non-secure facility is "characterized by the absence of physically restricting construction, hardware and procedures." N.Y. Family Court Act § 712(e) (McKinney). The secure facility has a more authoritarian atmosphere. The juveniles are subjected to strip-searches, wear institutional clothing and follow institutional regimen. At Spofford, which is a secure facility, some juveniles who have had dispositional determinations and were awaiting placement (long term care) comingle with those in pretrial detention (short term care).

and was ordered detained further at Spofford for psychological testing and investigation. At his dispositional hearing on May 19, 1978, he was released to the custody of his mother on 2 years probation. Since his release, he has had no further contact with the court. (Exhibit 13)

Jerome Basnight, 14 years old, was arrested on October 14, 1977, and charged with first degree robbery and criminal possession of a weapon. He is alleged to have acted with 2 others to steal a pocketbook at gunpoint. He was released to the custody of his mother by the police. A § 739 hearing was held on October 20, 1977, before Judge Ferrara, 6 days after the event. The boy was ascertained to be registered in school, to be a resident of Staten Island and to have no prior criminal record. The judge detained him because the matter was "quite serious," and the boy seemed involved in bad company. A probable cause hearing was held on October 24. He had been detained 4 days at the time of the probable cause hearing. Probable cause was found, and he remained in custody until a fact finding hearing on November 1. He was adjudicated a delinquent at that hearing on the robbery charge, and disposition was reserved. At the dispositional hearing on November 29, 1977, Basnight was placed on probation for one year under the supervision of the County of Richmond. (Exhibit 10) Basnight testified at trial that he was registered in McKee Vocational High School in Staten Island, and that because of the time spent in detention, he lacked the necessary points to qualify for auto shop training because he could not make up the deficiency.

Gregory Martin, 14 years old, was arrested on December 13, 1977, charged with robbery and assault with crim-

inal possession of a weapon for striking another youngster with a loaded revolver and stealing his jacket and sneakers. A § 739 hearing was held on December 14, before Judge Ferrara. Martin had no prior record. Citing the lateness of the hour when the crime occurred, that the boy had given the police a false address and the loaded weapon, the judge ordered Martin detained. At the December 19 probable cause hearing, probable cause was established. He had been detained 6 days before this hearing. The fact finding hearing held December 27-29, adjudicated Martin a delinquent and guilty on all counts. At the February 14, 1978 dispositional hearing, he was given 2 years probation. (Exhibit 11)

Luis Rosario, 14 years old, together with 4 others, was charged with an attempt on March 2, 1979, to rob two men. It was alleged that a gun was used and that Luis and his companions beat the two men about the head with sticks. Luis was released. A § 739 hearing was held before Judge Roache on March 15. At that time Luis had another delinquency petition pending for knifing a student, and two prior petitions had been adjusted. The court ordered him detained, noting his prior court appearances. Probable cause was found on March 21. On April 11, the boy was released to his father, and the case was terminated on September 25, 1979, without adjustment. (Exhibit 2)

Kenneth Morgan, 14 years old, was arrested on March 25, 1978, and charged with attempted robbery and threatening a 14 year old girl and her brother. A § 739 hearing was held on March 27, before Judge Moskoff. Kenneth was then on release status on another robbery charge. He was ordered detained. A probable cause hearing was appar-

ently set for March 30, but continued until April 4, where it seems to have been combined with a fact finding hearing. He was found guilty of harassment and petty larceny. Morgan was detained 10 days before the April 4 probable cause continued hearing, and 8 days subsequent to the § 739 determination. On July 5, at a dispositional hearing, he was ordered placed with the Department of Social Services for 18 months. (Exhibit 3)

Phil Hanna, 13, and *Calvin Jenkins*, 15, were arrested and charged with robbery and criminal trespass on August 23, 1977, for breaking into a store and damaging equipment. A § 739 hearing was held before Judge Rigler on August 24. Hanna had had prior court contacts and Jenkins, with 2 delinquency petitions pending, was on probation. Both were ordered detained. At the August 29 probable cause hearing, Jenkins and Hanna were paroled. On October 21, 1977, their cases were dismissed for lack of prosecution. They were held in pretrial detention for 6 days before the probable cause determination. (Exhibit 4)

James Price, 13 years old, was arrested on September 11, 1978, for attempting to pull a necklace from a man's neck and was charged with robbery, assault and grand larceny. A § 739 hearing was held before Judge Ferrara on September 12. Price had had prior court contacts, but the previous charges had not been pressed. He was ordered detained, the court citing his recent court contacts. A probable cause hearing was set for September 15, and at that hearing Price admitted to grand larceny and was placed in a non-secure facility. He absconded on September 27. At the time of the probable cause hearing Price had been detained for 3 days. (Exhibit 5)

Appendix C

Johnny McArthur, age 15, was arrested on October 12, 1977, for pointing a loaded, cocked automatic at a 13 year old. He was charged with criminal possession of a dangerous weapon and menacing and released by the police to the custody of his mother. A § 739 hearing was held on November 28, 1977, six weeks after his arrest, before Judge Heller. He was ordered detained, the judge stating it was his policy to remand those caught with loaded .45 caliber revolvers. The probable cause hearing was scheduled for November 30, 1977, but was adjourned, and he was released to the custody of his mother. As of November 30, he had been detained for 2 days. On January 10, 1978, the matter was dismissed without prejudice. (Exhibit 6)

Christopher Cox, 13, Glen Maloney, 13 and Wade Forde, 13, were arrested on October 13, 1976, along with Clarence Smith, 13, and Alex Michael, 15, and charged with grabbing and threatening people with a weapon in an attempt to take their bus passes. They were released to the custody of their parents. A § 739 hearing was held on November 12, before Judge Roache. Smith, who had retained private counsel, was paroled as was Michael. The court ordered Cox, Maloney and Forde detained despite the intake probation officer's recommendation of parole and the fact that the three had had no prior court contact. Forde was paroled to his parent's custody on November 15, and at the November 23 fact finding hearing he was adjudicated a delinquent. Forde was placed on probation for 2 years. Cox was placed on probation on January 13, 1977, but it was subsequently revoked. Forde appears to have been held in custody for 3 days before being paroled to his

mother's care. The case history does not contain any further information. (Exhibit 7).

Francisco Ramos, 15, was arrested on March 4 for breaking into a store and stealing goods and charged with burglary, petty larceny, criminal mischief and criminal possession of stolen goods. He was released to the custody of his parents. A § 739 hearing was held on March 17, 1978, before Judge Roache. He had a record of 9 prior arrests but all had resulted in adjustments and dismissals. Probation recommended release, but Judge Roache ordered him detained on the ground that prior arrests showed a likelihood that Ramos would commit a crime before the return date. A probable cause hearing was set for March 21, 1978, but the matter was continued. The final disposition of the proceeding was a discontinuance. Ramos was apparently in custody by order of the court for some 4 days until the matter was discontinued. (Exhibit 8)

Jose Cruz, 14, was charged with attempted murder and assault based on a March 7, 1977 incident in which Cruz allegedly pushed a 77 year old man down the stairs, beat him about the head and threatened him. At a § 739 hearing on March 25, before Judge Rigler, he was ordered detained in view of the severity of the charge. Probable cause was found on March 28, at which time he had been detained 3 days. The attempted murder charge was dismissed, and he was paroled in his mother's custody on April 1. On May 25, the assault charges were reduced, and the case was adjourned in contemplation of dismissal. (Exhibit 11)

Edwin Ascencio, 14, was arrested on December 12, 1977, with Edwin Rodriguez, and charged with arson and reckless endangerment for allegedly starting a fire in a subway.

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A § 739 hearing was held on December 13, 1977, before Judge Ferrara. Ascencio had a petition pending and had not been attending school. The judge ordered detention, citing the seriousness of the allegations as a basis. A probable cause hearing was held on December 16, 1977. Ascencio admitted to committing the offense and was released to his family. He had been held in custody for 4 days, 3 of them under order of the court at the time of the probable cause hearing. At the dispositional hearing on January 26, 1978, he was placed on 2 years probation. (Exhibit 12)

James Peebles, 15 years old, was arrested and charged with arson for allegedly setting fire on July 4, 1978, outside the door of the complainant's apartment while the complainant and his family were inside. A § 739 hearing was held on July 5, before Judge Quinones. The boy was ordered detained, the judge citing the seriousness of the crime as the basis for his action. At the July 10 probable cause hearing Peebles admitted to reckless endangerment. At that time he had been in custody for 6 days. Detention was continued for psychological evaluation. On July 20, 1978, he was released to his mother. Parole status was revoked in December, 1978, and at the dispositional hearing he was placed with the Division for Youth. (Exhibit 14)

Jeffrey McCain, 15, was arrested on May 23, 1978. A § 739 hearing was held on May 24, 1978, before Judge Doran. The boy had been arrested on robbery charges on 3 prior occasions that same month, and petitions for these offenses were pending. He was ordered detained. A probable cause hearing was set for May 28, 1978, but was postponed. The matter was eventually dismissed because of lack of proof beyond a reasonable doubt to support the

charges. McCain was held in custody for at least 4 days before the scheduled May 28 probable cause hearing. The record does not disclose the date of the boy's release. (Exhibit 15)

Carl Harris, 15, and Michael Taylor, 14, were arrested on March 5, 1977, for posession of stolen property and released. A § 739 hearing was held 12 days later on March 17, before Judge Rigler. In view of prior court contacts, the court ordered both detained. On March 21, 1977, both were adjudicated delinquent. By that time they had each spent 4 days in detention. At the dispositional hearing on May 16, 1977, Carl was placed on probation and Michael with the Commissioner of Social Services. (Exhibit 16)

Victor Melendez, 15, was arrested on July 11, 1977, for breaking and entering a school building at night and causing $1,500 in damages. A § 739 hearing was held on July 13, 1977, before Judge Gartenstein. This was Melendez's fourth arrest since March, 1977. He was ordered detained. A probable cause hearing was set for July 19, but was adjourned and was finally held on August 12, 1977, at which time Melendez was adjudicated a delinquent. On December 16, 1977, he was placed on one year's probation. It is unclear from the record what part of the period from July 11 to August 12, Melendez spent in detention.[6] (Exhibit 17)

Tyrone Parson, 15, was arrested on November 6, 1976, for promoting gambling and for possession of a gambling device and released. At a § 739 hearing held on December

6. If he was in fact held in custody from July 13 to August 12 before the probable cause hearing, the statutory time constraints appear to have been breached. *See* N.Y. Family Court Act § 739(b) (McKinney).

1, he was ordered detained. Seven prior court petitions were then pending. At the probable cause hearing on December 6, the petition was dismissed because the offense alleged did not come within the provisions of the penal law. He had been detained for 5 days between his § 739 and probable cause hearings. (Exhibit 18)

Geraldo Delgado, 15, was arrested on March 4, 1976, for stabbing and killing another boy. A § 739 hearing was held on March 5, 1976, before Judge Matthews. He ordered the boy detained because of the seriousness of the crime. Probable cause was found on March 10. Delgado had been detained for 5 days between his § 739 hearing and probable cause determination. Delgado was adjudicated a delinquent on April 4, 1976, and psychological tests were ordered. On July 7, 1976, he was released to his mother's custody and placed on one year's probation subject to treatment at Lincoln Hospital Adolescent Treatment Center. (Exhibit 19)

Tony Gomez, 15, was arrested on October 26, 1978, for allegedly assaulting and robbing a 77 year old woman and charged with grand larceny, robbery, assault and possession of stolen property. A § 739 hearing was held on October 27, 1977, before Judge Ferrara. He was ordered detained. Three prior petitions for robbery and attempted rape had been terminated without adjustment. A probable cause hearing was scheduled for October 31, but was adjourned. Gomez was released on a writ of habeas corpus on November 10, 1977. At the time he had been held in custody without a probable cause adjudication for 15 days, 14 of those days were pursuant to the court's order under § 739(a)(ii). On December 7, 1977, he was adjudicated a

delinquent and given a one year suspended sentence. (Exhibit 20)

Maurice Dunaway, 13, was arrested on July 22, 1976, for theft of subway bus transfers from a Transit Authority transfer box. A § 739 hearing on July 23, 1976, was held before Judge Roache. The boy was ordered detained due to alleged threats against the complainant, disobedience at home and prior court contact. Another petition for a similar offense was outstanding. A probable cause hearing was set for July 27, but was adjourned to August 3. On the latter date Dunaway was adjudicated a delinquent. He had been detained for 11 days under court order at the time of his probable cause hearing on August 3. Thereafter he remained in custody until October 12, 1976, and then was released to his mother while placement was explored. On April 20, 1977, he was placed with the Division for Youth for 18 months. (Exhibit 21)

Daniel Nelson, 15 was arrested on April 19, 1979, charged with petit larceny for allegedly stealing a radio valued at $85, and released to the custody of his parents. A § 739 hearing was held on May 3, 1979, before Judge Roache. At the time, Nelson was on probation on a prior charge and was ordered detained. The probable cause hearing was held on May 6, and he was adjudicated a delinquent. At the time of his probable cause hearing he had been detained for 3 days. On December 12, he was placed with the Commissioner of the Department of Social Services for 18 months. (Exhibit 22)

Daniel Gregoire, 15, was arrested on August 23, 1977, on charges of burglary and criminal possession of stolen property. A § 739 hearing was held on September 20, 1977,

before Judge Roache. Six prior delinquency petitions against this juvenile had been dismissed. His father told the judge that he could not control the boy and did not want him home. He was ordered detained and remained in custody until September 23, 1977, when he was paroled to his brother. Probable cause was found on September 29, and at the dispositional hearing he was placed in St. Vincent's for 18 months. Gregoire had spent a total of 3 days under court ordered detention. (Exhibit 23)

Carlos Lopez, 13, was arrested on August 30, 1977, for breaking and entering a store at 4:00 A.M., and was charged with burglary, petit larceny and criminal mischief. A § 739 hearing was held on August 31, 1977, before Judge Rigler. He was ordered detained because of family problems and five pending petitions. A probable cause hearing was set for September 6, 1977. On September 9, he absconded, was returned and absconded again on September 22, 1977, and again was returned. On November 10, 1977, the case was adjusted in contemplation of dismissal. It is difficult to ascertain the precise number of days this juvenile was detained, but it seems to have been at least 7 days before the probable cause hearing. (Exhibit 24)

Kevin West, 14, was arrested on May 31, 1971, and charged with grand larceny, jostling and resisting arrest, for taking property from a 71 year old woman and striking the arresting officer. The § 739 hearing was held on June 1, 1979, before Judge Matthews. Several outstanding petitions were then pending. West was ordered detained. On June 5, he was adjudicated a delinquent and placed with the Division for Youth for 12 months. His time in detention under court order before his probable cause hearing was 4 days. (Exhibit 25)

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Carlos Fargas, 14, was arrested on April 24, 1979, for threatening to strike the complaining witness with a broomstick. He was charged with robbery, grand larceny, unlawful imprisonment and possession of stolen property. He was released pending a § 739 hearing which was held on June 6, before Judge Pollard. The failure of his parents to accompany him to court meant a lack of supervision to the judge and created a likelihood of further delinquent acts. For these articulated reasons he was detained. On June 11, he was paroled to the custody of his parents. He had been in pretrial detention under court order for 5 days. (Exhibit 26)

Jody Allen, 12, was arrested on May 25, 1979, for beating an elderly woman who had to be hospitalized. There had been seven previous court contacts but no findings. He was charged with assault and attempted robbery and released. The § 739 hearing was held on June 1, before Judge Pitaro. He was ordered remanded. The complaining witness did not prosecute the matter. Allen was released to the custody of his grandmother on June 4. He had been detained under court order for 3 days before being released. The petition was withdrawn on June 25. (Exhibit 27)

Emmett Jacobs, 14, was arrested for stealing a watch on May 30, 1979, and charged with robbery and grand larceny. A § 739 hearing was held on May 31, before Judge Leddy. Three prior petitions had been filed, but no findings had resulted. Noting his prior court contacts, the court ordered Jacobs detained. At the probable cause hearing on June 4, Jacobs admitted to petit larceny. At final disposition he was placed with the Division for Youth

for 12 months. He had been detained 4 days before his probable cause adjudication. (Exhibit 28)

James Ancrum, 15, was arrested on August 16, 1979, for attempting to take a necklace off a man's neck. The man was allegedly beaten and thrown down a flight of stairs. A § 739 hearing was held on August 21, before Judge Ferrara after an order was issued removing the case from criminal court. Probation recommended release, but Ancrum was ordered detained, in view of the lateness of the hour when the act was allegedly committed. On August 24, probable cause was found. He was released to his mother's custody, and the petition was withdrawn. He was detained for 3 days under court order before the probable cause hearing. (Exhibit 35)

Douglas McLaughlin, 14 years old, was arrested on June 29, 1978, for burglarizing an apartment. Apparently he was on parole between the incident and the § 739 hearing on July 7. He had been arrested once previously, though no petition had been filed. The § 739 hearing was held before Judge Quinones, who ordered the boy remanded due to a statement by the boy's mother that he was beyond her control. A fact finding hearing was set for July 11, then adjourned until July 13, at which time McLaughlin was released to the custody of his mother. He was detained under court order for 6 days before the probable cause hearing. The petition was ordered dismissed on January 12, 1979. (Exhibit 43)

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III

Juvenile Delinquency Proceedings

The threshold step in the court process in juvenile delinquency proceedings occurs at probation intake in family court. The juvenile may be brought to the intake part from temporary detention or in police custody, in which case he comes to the court in handcuffs and under police escort. The juvenile may have been released to the custody of his parent or guardian, with instructions to appear in court at an appointed time. N.Y. Family Court Act § 741 (McKinney). In these cases the juvenile appears on his own at probation intake, usually accompanied by a parent or relative. If the complainant appears, and it is the court's understanding that, more often than not, the complainant is a police officer, the case is assigned to a probation intake officer. If no complainant appears, a new date is set, and if after several continuances the complainant still does not put in an appearance, the non-felony proceedings are terminated. If a felony, the case is referred to the district attorney.

The intake probation officer must hold either a master's degree in social work or in sociology and related fields or such a bachelor's degree, plus two years of paid-for experience in social work and related fields. Many of the probation officers currently on duty in probation intake possess only the lower academic credentials augmented by relevant work experience.

The probation officer to whom the case is assigned interviews the police officer, the juvenile and parent or guard-

ian, if present. Typically, the civilian complainant signs a statement at the police station and does not appear at probation intake. The juvenile is not represented by counsel. The purpose served by these interviews is to enable the probation officer to ascertain the nature of the offense charged, to obtain the juvenile and the police version of what took place, to assess the juvenile's role and personal involvement in the offense and to secure some background facts on the child. The juvenile is not subjected to any professional psychiatric or psychological examination unless mental health problems are patently evident. The entire interview process takes between 10 and 40 minutes. After the interviews are concluded, the officer checks to ascertain whether the juvenile has a history of prior involvement with the court. He then decides whether the case should be adjusted, that is, disposed of without court intervention. He may adjust the case, leaving it open to see whether the juvenile lives up to the conditions imposed with a view to having the case ultimately dismissed. Whether the case is adjusted or referred to court intake for further proceedings is determined based on criteria set forth in Family Court rules and the regulations in the New York State Department of Probation. N.Y. Family Court Act § 734(a) (McKinney); Family Court Rules, §§ 2507.3-2507.6.

If the officer decides that the case must be processed through court, the case is sent to court intake for a petition to be drawn and prosecution by the district attorney or corporation counsel. N.Y. Family Court Act § 731(i) (McKinney). When the probation officer decides to refer the matter to court intake for the drafting of a petition and

further proceedings, he must accompany the reference with a recommendation that the juvenile either be remanded or paroled. This recommendation is based on the nature of the case, whether there is a prior record, the attitude of the juvenile and of the parent.[7] There do not appear to be any governing criteria which must be followed by the probation officer in choosing between proposing detention and parole, nor do psychological or psychiatric factors appear to be considerations involved in the probation officer's recommendations.

Although the court was advised at trial that the corporation counsel is increasingly demanding that petitions be based on the statement of a complainant with personal knowledge of what took place, we were nonetheless advised that petitions based solely on information and belief are still being processed.

If in custody, the juvenile must be brought before a judge for a § 739 hearing within 24 hours. The judge may order him held for an additional 24 hours before holding the § 739 hearing. If the hearing results in pretrial detention, a fact finding hearing, which is equivalent to a trial on the merits, must occur within 3 to 6 days thereafter. N.Y. Family Court Act § 747 (McKinney). In some cases fact finding may be put off for good cause as long as 14 days after the § 739 proceeding, but if such a postponement occurs, there must be a probable cause hearing within 72 hours of the § 739 determination. N.Y. Family Court Act § 748 (McKinney)

7. In certain designated felony cases, the officer makes no recommendation about release or parole but merely summarizes the record in the case. (Tr. 72).

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The § 739 hearing takes place at court intake and is similar to an arraignment in an adult case. The juvenile is brought before the judge and assigned counsel. The charges are read, and the juvenile is advised of his rights. N.Y. Family Court Act § 739 (McKinney). In addition to the juvenile and assigned counsel, the prosecutor, court liaison officer and probably a parent or guardian are also present. The court liaison officer is the probation officer on duty at court intake. He is not the probation intake officer who interviewed the juvenile and whose recommendation to remand or parole the judge will act upon. There is an official stenographic transcript of this proceeding, but no inquiry is made into the non-hearsay allegations of the truth of the charges, and no testimony is taken under oath. After the charges are read and the juvenile is advised of his rights, the judge asks for the recommendation from probation intake. This is read to him by the court liaison officer. The judge may make a few inquiries of defense counsel, prosecution and court liaison officer. Then he announces his decision whether to order detention or parole the juvenile. He usually gives some indication on the record of his reasons for ordering pretrial detention.

Each judge follows his own individual approach to this determination. Judge Cesar Quinones, the only judge of family court to testify, stated that his determinations are based on the petition, prior record and the probation officer's recommendation. He also considers whatever facts are brought out by defense counsel, but appointed counsel (the usual case) is assigned at court intake when the case is called and has very little opportunity to learn much per-

tinent information about the juvenile. Background on the child is not available at the court intake unless there has been prior court contact, and if the latter, this is a negative factor. Often there is no one present with personal knowledge of what happened.

Judge Quinones stated that he considers allegations of violence against persons more serious than property infractions; that he looks to the seriousness of the charges, whether anyone was hurt, whether the acts occurred in early morning which would be indicative of lack of parental supervision. He testified that a § 739 determination to detain the juvenile is not intended to benefit the child, but to protect society. At court intake, Judge Quinones testified, approximately 30 cases are processed in a typical 9-5 day, thus each proceeding is of 5-15 minutes in duration. The great majority of juveniles ordered detained are blacks and Puerto Rican. No uniform court or judicial criteria, yardstick or guidelines govern a § 739 disposition. In deciding whether the juveniles should be detained, each judge must rely on his own subjective judgment, based on the limited information available to him at court intake and whatever personal standards he himself has developed in exercising his discretionary authority under the statute. (Tr. 435-513).

At the fact finding hearing, a determination is made whether the juvenile is to be adjudged delinquent because he is found to have committed the offenses charged, or, as in the typical case, a lesser offense than that originally charged. Where a probable cause hearing precedes fact finding, there must be a sufficient prosecutorial presentation to warrant a finding of probable cause that the juvenile

committed the offense charged, and, as the case files show, these probable cause and fact finding proceedings often result in an admission by the juvenile that he committed a lesser offense. If the fact finding hearing results in an adjudication of delinquency, the juvenile has a dispositional hearing, at which time the judge determines what form of punishment or discipline is warranted. The dispositional hearing determines whether the juvenile is to be sent to a state facility, secure or unsecure, or released on probation. N.Y. Family Court Act § 753 (McKinney). Probation prepares a report for the judge at disposition which is compiled after a full investigation of the juvenile in school, community and home and a study of relevant intake records.

In 1979, 58.2% of the juveniles held in pretrial detention[8] were accused of crimes against property and other

8. There was considerable testimony concerning the type of facility to which a juvenile is remanded for detention prior to dispositional hearing. Michael Bigley, director of detention services section, New York State Division for Youth, testified that detention is short term care which may last through dispositional stage pending final placement. Long term care commences at placement pursuant to a dispositional determination. He testified that in 1978, in New York City there were 7,362 initial admissions (of both juvenile delinquents and juvenile offenders) to secure facilities and 50% of the juvenile delinquents admitted to those facilities were there for 3 days or less (Tr. 206-07). In 1979, there were 1,216 admissions of juvenile delinquents to non-secure facilities (Tr. 211-12). In 1979, a total of 8,557 juveniles were admitted to secure facilities; 2,428 whites, 4,501 blacks and 1,386 hispanics. (Tr. 222).

The testimony appears to be at odds with the final figures set out in the Report of Chief Administrator (Tables 79, 80, 81, 82) for the calendar year 1979, *see* text pp. 55a-56a. If we include all of those detained adding those detained before petition to the figures given for those detained after petition, and include placement with the Commissioner of Social Services, Title 2 and Title 3 placements with the Division for Youth as placement in secure facilities, the total 4,783 does not coincide with 8,557, the figure given by Mr. Bigley at trial.

non-violent crimes; 47.1% were accused of crimes against persons and other violent crimes. In 1977, 18,447 juvenile delinquency petitions were disposed of. Pretrial detention was ordered in 3,546 instances.[9] At final disposition 47 juveniles were subjected to some form of restricted placement and 594 were placed in Division for Youth under Title 2, and 667 were placed with the Division under Title 3.[10] The latest published statistics are for the year 1979. There were 17,880 juvenile delinquency petitions filed in the state.[11] Pretrial detention was ordered in 4,290 cases.[12] Of the petitions filed, 932 were dismissed at fact finding;[13]

9. Table 81 and Table 82, pp. 162-165, 1977 Annual Report for 1977 of the Administrative Board of the Judicial Conference and Office of Court Administration of the State of New York (1978), show that 347 juveniles were detained before the filing of the petition, and 3,546 were detained between the filing of the petition and disposition. If the latter figure does not include the former, as the text assumes, the number of juveniles subject to pretrial detention would be 3,793.

10. Tables 83 and 84, pp. 166-169. N.Y. Executive Law § 502 *et seq.* (McKinney), authorizes the Division for Youth to establish youth centers—camps, residences or other buildings for the care, treatment, education, rehabilitation and guidance of youth between 15 and 18 years of age. The program may include training and service in conservation, civil defense, disaster relief, etc. Youths assigned there may be there only part time. It is to such centers that Title 2 placement refers.

Title 3 placement is provided for in N.Y. Executive Law § 510 *et seq.* (McKinney), and these are training schools operated by the Division for Youth for juvenile delinquents under the age of 16 at the time the delinquent act is committed and under 17 at the time of placement. These schools are authorized to offer general rehabilitation programs.

11. Tables 79 and 80, pp. 86-87, Report of the Chief Administrator of the Courts for the Calendar Year 1979, State of New York (1980).

12. *Ibid.*

13. Tables 81 and 82, pp. 88-89, Report of Chief Administrator of the Courts, *op. cit. supra* note 11.

23 were dismissed for other reasons and 292 at the dispositional hearing;[14] 731 were dismissed for failure to prosecute;[15] 846 were dismissed without prejudice;[16] 4,882 were dismissed in furtherance of justice,[17] and 1,617 were dismissed for other reasons;[18] 1,456 petitions were withdrawn;[19] 19 were discharged with warnings;[20] in 725 cases judgment was suspended;[21] 3,511 were placed on probation without placement;[22] 17 were placed on probation and placed in private homes;[23] 760 were placed with the Commissioner of Social Services;[24] 412 were placed with the Division for Youth under Title 2;[25] 594 were placed with the Division under Title 3;[26] 2 were placed in restrictive placement for 5 years, 2 for 3 years and 70 in other forms of restricted placement.[27]

IV

The Parties' Contentions

Petitioners contend that the statute is unconstitutional on its face and as applied in that it offends the due process

14. *Ibid.*
15. *Ibid.*
16. *Ibid.*
17. *Ibid.*
18. *Ibid.*
19. *Ibid.*
20. *Ibid.*
21. *Ibid.*
22. *Ibid.*
23. *Ibid.*
24. *Ibid.*
25. *Ibid.*
26. *Ibid.*
27. *Ibid.*

and equal protection guaranties of the 14th Amendment. Petitioners argue that the subjective prediction or prognosis of the imminence of future misconduct which § 739 (a)(ii) authorizes as the basis for the pretrial detention of juveniles is a vague, arbitrary and capricious standard and that no rationally based prediction or reasoned determination is possible under the statutory scheme. They insist that the statute is overbroad and violates equal protection constraints in authorizing pretrial detention of juveniles, since they are thereby treated differently from adults, and there is neither a rational basis pertinent to the differentiation between the two groups, nor any compelling state justification to warrant imposition of the restrictions imposed on juveniles under the statutory scheme. Petitioners also argue that the burden the statutory scheme imposes falls more heavily on non-white minorities and the poor than on whites and the more affluent, but they stop short of making a specific claim of a denial of equal protection on that basis.

The attorney general argues *pro se* that the statutory scheme is constitutionally and legislatively permissible; that all judicial and administrative decision making in the criminal justice system has the same potential for inaccuracy in predicting future acts, as does the statute involved here, but nonetheless the judge's subjective determinations as to bail, parole, and length of sentence have been accepted as appropriate exercises of judicial discretion free of constitutional infirmities; that the statute does not result in random detention; that pretrial detention does not constitute punishment without trial and does not deny juveniles any due process or equal protection rights, and in any event,

the compelling interest of the state in reducing the risk of pretrial crimes by juveniles justifies the difference in the treatment of juveniles and adults and validates the statute.

V

Determination

A

The issues raised in this litigation are difficult and complex. Petitioners contend that the statutory scheme is at war with the guarantee of equal protection since juveniles are subjected to pretrial detention while adults are not. Both parties argue that the appropriate test to measure the constitutional validity of § 739(a)(ii) under the equal protection clause is whether the state has demonstrated a compelling, overriding state interest justifying the legislation, and no feasible, less drastic measures are appropriate to accomplish the state's objective.

In *People ex rel. Wayburn v. Schupf*, 39 N.Y.2d 682, 385 N.Y.S.2d 518 (1976), the New York Court of Appeals unheld the Act against an equal protection challenge on the ground that the statute served a compelling state interest. That interest as articulated by the court was the juveniles' emotional and intellectual immaturity, necessitating that they not be held to the more onerous adult standards of responsibility for their conduct. Moreover, the court reasoned that immaturity and lack of comprehension caused juveniles to view criminal conduct less seriously than adults. Accordingly, procedures designed to prevent further criminal

acts by juveniles accused of delinquency were held to be justified to protect the public.

If the parties are, and the state court was, correct that compelling justification and unavailability of any feasible less drastic alternatives are the criteria to measure the statute's validity under the equal protection clause, my task would be considerably eased. § 739 clearly cannot withstand a constitutional challenge when the equal protection test of strict scrutiny is applied.

The record made at trial reveals that roughly 3,546 juvenile delinquents were subjected to pretrial detention in 1977. The figures on final disposition of all juvenile delinquencies show that 667 were placed in training schools of the Division for Youth and 47 others were accorded some other form of restricted placement. Assuming that the above 714 juveniles were all among those subjected to pretrial detention (an assumption not necessarily correct), the remaining 2,832 cases resulted in probation to the custody of the parent, guardian or placement in a foster home, or placement in a youth camp.

The 1979 figures paint the same picture. Some 17,880 juvenile delinquency petitions were filed. 4,290 juveniles were held in pretrial detention; 670 were placed with the Commissioner of Social Services, 412 with the Division for Youth under Title 2; 594 with the Division for Youth under Title 3, and 77 were accorded some form of restricted placement. (*See ante,* pp. 55a-56a). Assuming again that all of these 1,753 were subjected to pretrial detention, the result is that more than half such cases resulted in some form of dismissal or probation. Under any yardstick when at final

disposition the overwhelming majority of juveniles are paroled and sent home, the claim that there is a compelling need to subject them to pretrial detention becomes hard to credit.[28]

Sixteen juveniles in the case file histories which make up the record in this case were on parole from 5 to over 30 days between the time of the commission of the offense and their § 739 hearing, with no evidence that in the interim any further crimes had been committed. Yet they were remanded. In some cases there had been no prior court contact, and parole was recommended. Nonetheless, detention was ordered. These instances show a clear lack of any compelling justification in the application of the statute. If a juvenile has been on parole a month, two weeks or 5 days without committing another crime, unless family courts are assumed to be sorcerers who can foretell future events, it is difficult to understand the rationale for depriving him of his freedom because of the likelihood that he will commit a crime within 3 to 6 days. Such decisions, under any circumstances would seem to constitute abuse of discretion.

It is, of course, clear that neither the 14th Amendment nor the Bill of Rights' strictures protect only adults. *In re Gault*, 387 U.S. 1 (1967). Moreover, the mere recitation of benign, compensatory purposes is not an automatic shield which protects against inquiry into the actual impact of a statutory scheme, *Weinberger v. Wiesenfeld*, 420 U.S.

28. I admire the candor of Michael Bigley, who, on being asked whether he would consider pretrial detention probably unwise if the ultimate disposition was parole to the youth's own home or to a foster home, replied that he would not say it was probably unwise but that it was possibly unwise. (Tr. 261).

636, 648 (1975), and in its application demonstrated on this record, there has been no articulation of the *parens patriae* thesis as justification for exercise of the court's authority under § 739(a)(ii).

Remand has been deemed warranted in this case because of the seriousness of the crime, because of prior court contact, because the court always orders detention in certain cases, because such is warranted to punish the juvenile or, as Judge Quinones testified, to protect the public. Yet restraints of minors which might be considered impermissible if applied to adults have been justified as furthering an appropriate state interest, *see e.g. Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 102-103 (1976) (Stevens, J., dissenting), and *parens patriae*, while not an unlimited justification, *Kent v. United States*, 383 U.S. 541, 555 (1966), has been the underlying validating basis for a state's special treatment of the young. The high minded purposes of the juvenile justice system and the designation of proceedings involving juveniles as civil, rather than criminal, serves a benign social function, but "serious questions [arise] as to whether the actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guarantees applicable to adults." *Kent v. United States, supra* at 555.

Yet, in no case has the United States Supreme Court subjected a juvenile classification to the strict scrutiny for classifications based on race, *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 191-2 (1964), alienage, *Oyama v. California*, 332 U.S. 633, 664-66 (1948); *Korematsu v. United States*, 323 U.S. 214 (1944);

Hirabayashi v. United States, 320 U.S. 81 (1943), or where the right or interest interfered with is characterized as fundamental, *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978), or struck down the differentiation between the treatment of juveniles and adults because the criteria applicable to the above classification were not met.

This provision seems to lack the high minded purpose of protecting the juvenile which is the objective generally cited to justify deviations from adult standards in the juvenile justice system. Rather, the purpose seems to be to protect society from the juvenile. No articulated rationale has been set forth on this record which would warrant disadvantaging the young on this ground. Nonetheless, I regard the equal protection challenge to the statute as insubstantial.

The right of a state to differentiate between adults and minors is too ingrained in the fabric of the law for such classifications at this late date to be held to the test of strict scrutiny. Even though a pretrial detention interferes with the juveniles' personal liberty, that alone would not seem to warrant application of the strict scrutiny test. *See e.g. Bell v. Wolfish*, 441 U.S. 520 (1979). The more appropriate inquiry is whether § 739(a)(ii) can be justified on grounds of rationality, *see Weinburger v. Salfi*, 422 U.S. 749 (1975), and under this less rigorous yardstick, the statutory scheme would qualify as meeting the constitutional requirements of equal protection. Equal protection guarantees deal with invidiously discriminatory classifications and differentiations. This statute does differentiate between youth and adults but to paraphrase Justice Powell, concurring in *Zablocki v. Redhail*, 434 U.S. 374, 399 (1978),

to subject § 739 to a compelling state purpose inquiry would cast doubt on the network of laws that the states have devised to deal with problems of the young—delinquency, neglect and care. Accordingly, I turn to what I regard as a more substantial challenge to the statute.

B

The statutory scheme curtails the freedom of one presumptively innocent, albeit a juvenile, on the prediction or hunch of a judge that unless held in custody he will commit another crime within 3 to 6 days. The more fundamental consideration, therefore, is whether on its face or as applied, § 739(a)(ii) meets due process standards. There is little doubt that due process is a requisite to the constitutional validity of proceedings which may result in the curtailment of a juvenile's freedom, since all "individuals possess a liberty interest in being free from physical restraint." *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1, 33 (1979) (Marshall, J. dissenting). While the limits of the liberty interest protected from deprivation without due process have never been precisely defined, it has "always been thought to encompass freedom from bodily harm and punishment. *See Rochin v. California*, 342 U.S. 165 (1952). It is fundamental that a state cannot hold and physically punish an individual except in accordance with due process of law." *Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977).

Juvenile proceedings which may result in confinement to state institutions because of alleged misconduct must have the essential ingredients of fair treatment. *In re Win-*

ship, 397 U.S. 358, 359 (1970); *In re Gault*, 387 U.S. 1, 18, 19 (1967); *In the Matter of W & S*, 19 N.Y.2d 55, 277 N.Y.S. 2d 675 (1966). Application of due process standards may not be defeated because of the labels attached by the state to the pertinent proceedings, *In re Gault, supra*, 387 U.S. at 50-51; *In re Winship, supra*, 397 U.S. at 366, and a "claim that the traditional requirements of due process are applicable in the context of pretrial detention" has not been foreclosed. *Gerstein v. Pugh*, 420 U.S. 103, 127 (1975) (Stewart, J. concurring).

The predictive § 739 determination is made before any proceeding, either adversarial or neutral, has found probable cause or rendered a determination on the merits that the juvenile committed the delinquent act charged. The Act violates due process requirements because: (1) it gives the judge a license to act arbitrarily and capriciously in a § 739 prediction of the likelihood of future criminal conduct which cannot result from a reasoned determination, (2) pretrial detention without a prior adjudication of probable cause is, itself, a per se violation of due process, and (3) in addition, constitutes punishment that is constitutionally impermissible under the due process clause.

1. The first defeat is perhaps the most pernicious. The judge is empowered to make a prediction about the probability of an individual committing a crime if released. No guidelines for making that determination are set out in the statute, and none has been adopted by the court. The judge's determination is moored to no concrete or reasonably determinable yardsticks. We were advised at trial that each judge utilizes his own personal standards. Ac-

cordingly, there can be no uniform application of § 739, since each judge's subjective views and biases must necessarily govern. The whole process is riddled with subjectivity and caprice and confers upon the judge "a license for arbitrary procedure." *Kent v. United States, supra* at 553.

A judge is not an expert criminologist and even these professionals who have studied more about an individual's criminal propensities than the rest of us confess, as we shall see later, an inability to perform the task § 739 imposes on the judge. Thus, "[a] serious question of procedural due process is raised by this feature of standardless discretion, particularly in light of the hazards of prediction . . ." *Zablocki v. Redhail*, 434 U.S. 374, 402 n.4 (1978) (Powell, J. concurring). Moreover, the judge is accorded total and unbridled discretion since effective review is not possible, *see New York ex rel. Wayburn v. Schupf, supra.*[29]

Although the probation intake officers are required to follow established criteria in determining whether to adjust a case or pursue it through the courts, they make their recommendations whether to release or remand the juvenile based on "whether they feel a child may be a calculated risk if returned to the community." (Tr. 161). Thus, as the study undertaken by Professor Wilkins referred to in

29. The short span of pretrial detention makes effective review impossible. Detention is over before the appellate review can be obtained. In *New York ex rel. Wayburn v. Schupf*, and, in this case, motions to dismiss on grounds of mootness were denied because to hold otherwise would have meant insulating § 739 from constitutional challenge. Nonetheless, in reality no juvenile ordered into pretrial detention can test the validity of that adjudication while he is being held in custody pursuant thereto.

his trial testimony demonstrated, juveniles under such circumstances may have their liberty curtailed because they possess "characteristics that annoy" the parole officer or judge, or because they may be viewed as "uncooperative." (Tr. 317). It is clear that the judge decides on pretrial detention for a variety of reasons—as a means of protecting the community, as the policy of the judge to remand (Exhibit 6a, p.3), as an express punitive device (Exhibit 42, p. 11), or because of the serious nature of the charge. (Tr. 465, Exhibit 13a, p.3), among others.

Probation intake cannot undertake a thorough investigation of the youth. The probation officer learns what delinquency is charged. This may be only marginally helpful because as a general rule the original charge is considerably reduced or modified after a probable cause or fact finding hearing.[30] He evaluates the case on the facts presented by the police officer and the juvenile. He ascertains whether the juvenile has had any prior court contacts and the nature of those contacts. He is not equipped to make any sophisticated or in depth evaluation of the charges or the child, particularly in light of time constraints. If the family court guidelines require him to process the case through the court, he must recommend, on the limited information provided, whether the juvenile should be detained or paroled.

30. Justice Stevens dissenting in *Baker v. McCollan*, 443 U.S. 137, 154 n.13 and accompanying test (1979), pointed to a study of the District of Columbia, Brosi, *A Cross-City Comparison of Felony Processing* (1979) which showed that 49% of those arrested are never tried at all, with all charges being dropped before trial, and another study, Kamisar, LaFave and Israel, *Modern Criminal Procedure* (1974) which states that nationally 40% of all adults arrested are released without charges being filed.

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While the time of probation intake is limited, there is considerably more time available than the judge may allocate. The judge has no opportunity to interview the juvenile. Whatever he hears in opposing remand comes from counsel for the juvenile. If counsel is court appointed, and this is the typical case, he takes on responsibility for the proceedings only moments before convincing reasons must be presented to the court for not ordering pretrial detention. The judge has roughly 5 to 15 minutes to determine whether there is the likelihood that the juvenile would commit another crime before the return date if released.

At trial, plaintiff's expert, Professor Leslie Wilkins, stated that he would be surprised if recommendations based on intake interviews were better than chance and assessed the judge's subjective prognosis about the probability of future crime as only 4% better than chance—virtually wholly unpredictable. He testified that no method had yet been devised which could predict with any acceptable degree of accuracy that a juvenile shall commit a crime, particularly the commission of an offense in a short space of time, as the judge must do in making his § 739 decision.

A review of the literature supports Professor Wilkins' observations and shows that no diagnostic tools have as yet been devised which enable even the most highly trained criminologists to predict reliably which juveniles will engage in violent crime.

As one of the leading scholars on the issue has put it:

> [t]he ability to predict which juveniles will engage in violent crime, either as adolescents or as adults, is very poor.

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> The conclusion . . . that "there has been no successful attempt to identify, within . . . offender groups, a subclass whose members have a greater than even chance of engaging again in an assaultive act" is as true for juveniles as it is for adults. It holds regardless of how well trained the person making the prediction is—or how well programmed the computer—and how much information on the individual is provided.

J. Monahan, The Prediction of Violent Behavior in Juveniles, 10-11 (paper presented at National Symposium on the Serious Juvenile Offender in Minneapolis, Sept. 19-20, 1977) (emphasis deleted), quoted in Feld, Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions, 62 Minn. L.Rev. 515, 541-42 (1978).

Moreover, not only does it appear that one cannot predict dangerousness with an acceptable degree of accuracy, but, to the extent that dangerousness can be predicted at all, there is a substantial problem of overprediction, that is, to identify persons potentially dangerous who, if subsequently released, would engage in no further violent or even criminal behavior. If a true positive is a person, who is predicted to and in fact engages in such behavior, then a false positive would be someone predicted to be dangerous but who would not engage in violent or criminal behavior. Thus, overprediction can be expressed in terms of the ratio of false positives to true positives.

Monahan also found that

> violence is vastly overpredicted whether simple behavioral indicators are used or sophisticated multi-

variate analyses are employed, and whether psychological tests are administered or thorough psychiatric examinations are performed.

J. Monahan, *supra*, quoted in Schlesinger, The Prediction of Dangerousness in Juveniles: A Replication, 24 Crime & Delinquency 40, 47 (1978).

The literature on the prediction of dangerousness, distinguishes two methods for anticipating future behavior: *clinical* prediction,[31] on the one hand, and statistical or actuarial prediction,[32] on the other.

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31. Clinical Prediction

In the face of the literature about clinical predictions, it would be impossible to be sanguine about relying on clinical methods. Feld, *supra* at 543, asserts that, "In view of the uncertainties and inconsistencies typically associated with social science research, the clear-cut superiority of actuarial methods over clinical methods is startling." Other researchers, Hermann Mannheim and Leslie Wilkins reported that their use of statistical prediction techniques proved to be twice as accurate as clinician's "intuitive" judgment. *See* Koerin, *supra* at 53, *and see* Tr. 314, and Wilkins, *passim*, Tr. 314-384. In light of the universal pessimism concerning the prospects of making accurate and discrete predictions of future criminal behavior using statistical methods, and the latter's recognized "clear-cut" superiority over clinical methods, the clinician must be disheartened.

Schlesinger, *supra*, noted the disparity between the general claim that prediction of violence was futile, on the one hand, and the claims of 9 studies, on the other, purporting to make such predictions of violent behavior in children. Employing 30 factors identified amongst the 9 studies, Schlesinger attempted to predict violent behavior in 122 children, based on their presentence evaluations from family court in California. He found a very low incidence of violent behavior among the juveniles—only 5.7%; no significant relationship among the predictor variables, clinician's recommendations and criterion behaviors; and no significant relationship between predictions of dangerousness and subsequent violent behavior.

Cocozza & Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 Rutgers L. Rev.

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32. Footnote appears at page 73a.—*Ed.*

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(footnote 31 continued)

1084, 1094-1101 (1976), reported on their study which followed up criminal defendants who had been found incompetent to stand trial in New York City. These defendants had been evaluated by psychiatrists to determine the defendant's dangerousness, although no definition of that term was provided. The difference in assaultive behavior between those diagnosed as dangerous and those not so diagnosed was found not to be statistically significant. The authors concluded that the study presented clear and convincing evidence of the clinicians' inability to predict assaultive behavior. *Id.* at 1098-99. *See also* Dix, *Clinical Evaluation of the Dangerousness of "Normal" Criminal Defendants*, 66 Va. L. Rev. 523, 542-44 (1980) (reviewing Cocozza and Steadman study). Examination of leading studies is said to confirm the inadequacy of evidence of the accuracy of clinical assessments. *Id.* at 544.

Those studies that indicate that it may be possible to develop reliable clinical methods of prediction also indicate how unlikely it would be for the family court judge's evaluations to be reliable. In *The Clinical Prediction of Dangerousness*, 24 Crime And Delinquency 28 (1978), Cohen, Groth and Siegel reviewed the literature criticizing clinical predictions and discussed two newer studies (Kozol, Boucher and Garofalo studying male sexual offenders over a ten-year period, and Hodges studying dangerous offenders over a three-year period) and concluded that these studies show "considerable improvement over the statistical studies. . . The two studies demonstrate, we believe, that a conclusion about our capability of predicting dangerousness is premature." *Id.* at 35.

In *The Diagnosis and Treatment of Dangerousness*, 18 Crime & Delinquency 371 (1972), Kozol, Boucher and Garofalo reported on a ten-year study of almost 600 convicted male offenders, most of whom had committed a sex crime, compounded in some cases by extreme violence. On the basis of the initial diagnosis, the authors concluded that more than half of the subject offenders were not dangerous. Of these, 8.6% of those who were released subsequently committed "serious assaultive crimes." After receiving treatment for an average period of 43 months, 82 additional patients were recommended for release. Of these, 6.1% subsequently committed serious assaultive crimes. Another 18 patients were released against the clinicians' advice after treatment for an average period of 30 months with a recidivism rate of 27.8%.

The Hodges study, reported in Cohen, et al, at 35, followed up on 447 dangerous offenders for three years, and found that of those recommended by the clinical staff for incarceration who were not incarcerated by the court, 81% subsequently committed another offense

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(not necessarily a violent crime). Of those committed to the treatment center but later released against staff recommendations, 71% committed a new crime, but of those committed and later released on the staff's recommendations, only 37% were later arrested for a new crime.

These newer studies do not show that a family court judge could make reliable predictions. Rather, by highlighting what is required for a reliable clinical prediction to be made, they show why the judge could not be expected to make reliable evaluations along clinical lines. As a preliminary matter, each of these newer studies ranged over a population that was in some respect selected before the clinicians began their work. The offenders studied were a small portion of the total inmate population. Thus, it is unclear how well these results could be generalized to the situation of the family court. In particular, since, on actuarial grounds, the fact that these individuals studied had been convicted makes it more likely that they will be "dangerous." The same cannot be said of the juveniles who were detained, or who risk detention, before trial. Moreover, each of the studies involves an initial classification by the clinical staff on the basis of which a substantial number of offenders are recommended for release. (In the Kozol, et al study, *supra*, over half were so released.) Even this initial diagnosis is, in terms of its depth, detail and sophistication well beyond what could be hoped for in the family court setting. In Kozol, *supra*, the initial diagnosis "is based on clinical examinations, psychological tests, and a meticulous reconstruction of the life history [of the offender] elicited from multiple sources—the patient himself; his family, friends, neighbors, teachers, and employers; and court, correctional, and mental hospital records. . ." 18 Crime & Delinquency at 383. Similarly, Cohen, et al, describe the norm for clinical predictions:

> In evaluating an offender, the clinician bases his or her prediction on an extended period of study, makes use of a variety of professional personnel, and consults diverse clinical, behavioral, and social sources of data. Typically, this involves a minimum of a sixty-day period.

18 Crime & Delinquency at 30-31.

Finally, these studies are apparently open ended in their definition of recidivism. As was noted *ante*, there is a wide discrepancy between the violence that may be indicated in general and that may be indicated for the relevant period of pretrial detention. There is no basis for supposing that a family court judge could predict reliably the juveniles who could be dangerous within the pretrial period.

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32. STATISTICAL PREDICTION

In reporting on both the current developments in statistical prediction and their own study, Wenk, Robison and Smith stated "The present state of the art holds little promise for the development of a prediction instrument that would warrant implementation in actual preventive or correctional programs." *Can Violence Be Predicted?*, 18 Crime & Delinquency 393, 401 (1972). While an expectation of increasing statistical sophistication might lead one to suppose that, in the fullness of time, a reliable predictive method could be achieved, there is no basis on which to suppose that the family court judge's evaluations could be expected to succeed where other attempts have failed.

For a number of reasons, the study reported in *Preventive Detention: An Empirical Analysis*, 6 Harv. Civ. Rights Civ. Lib. Rev. 289 (1971) ("Harvard study") is particularly telling. This study examined the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473 (July 29, 1970) ("preventive detention legislation"), which provides for the "preventive pretrial detention of arrested persons felt to pose a threat to the safety of the community." More specifically, under this law

> any defendant charged with a "dangerous" crime, with obstructing justice, or with a "violent" crime if certain conditions are met, may be held for pretrial detention hearing, at which a judicial officer is to determine whether any form of release can satisfactorily protect the community.

Id. at 303-04 (footnotes omitted). If the officer does not so conclude, he may order the defendant held for up to sixty days. In deciding which criminal defendants pose so great a danger to the community that they should be detained without bail, the statute charges the judicial officer to

> take into account such matters as [1] the nature and circumstances of the offense charged, [2] the weight of the evidence against such person, [3] his family ties, [4] employment, [5] financial resources, [6] character and mental conditions, [7] past conduct, [8] length of residence in the community, [9] record of convictions, and [10] any record of appearances at court proceedings, flight to avoid prosecution, or failure to appear at court proceedings.

Id. at 309. The statute does not assign a relative importance to these various factors.

The Harvard study tested the reliability of two numerical dangerousness scales, each of which combines in one index the particular de-

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fendant's score on all of the variables. The first scale (DS-1) was fashioned by assigning weights to the variables on the basis of a subjective assessment of their importance. The second scale (DS-2) "was constructed using a statistical technique, readjusting the weights of the variables on the basis of their actual correlations to recidivism in the sample." *Id.* at 310.

Each scale could be used by selecting a cut-off score, above which the individual would be detained. For DS-2, no cut-off point existed for which more recidivists than non-recidivists would be detained. Thus, over-prediction is a substantial problem. The lowest false positive to true positive ratio would be 1.5 to 1.0. To detain all true positives, 225 non-recidivists would be included along with the 41 recidivists. A point at which 63% of the recidivists would be retained would still represent a false positive to true positive ratio of 1.5 to 1. Much more startling are the results of the unsophisticated DS-1 scale. At its best, this scale would select correctly only about 30% of the time—that is, 7 false positives for every 3 true positives detained. To ensure that all recidivists were detained, in effect 8 nonrecidivists would have to be detained for every recidivist. Only by detaining fewer recidivists can this high degree of overprediction be avoided: When 40% of the recidivists were detained, the ratio was considerably reduced but was still high, a ratio of 2.88 to 1.

Neither of these sets of results actually measure what would happen in pretrial detention. First, the accurate and detailed information used in the study is not normally available to the judicial officer in a § 739 proceeding. Second, the Harvard study's definition of recidivism is not limited in time but relates to arrests and convictions occurring perhaps months following initial arrest and release. An accurate measure of the effectiveness of pretrial detention must consider the number of persons who would have committed crimes during the detention period only, and under this measure, the 60% accuracy figure for DS-2 falls to about 15%, and the 30% figure for DS-1 falls to about 5%.

In addition to the substantial body of literature in agreement that no reliable statistical prediction has been devised, the Harvard study indicates why the family court judge's determinations would be unreliable. Even to the extent that a set of variables could be attributed to the judge's evaluation, they would not have been weighted in a manner to enhance statistical reliability, and thus, the expectable range of accuracy would be that of the DS-1 scale. Further, since the judge's assessments bear only on pretrial detention, the expectable range of accuracy would likely be very low. Finally, the difficulty with overprediction would be substantial.

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> A clinical prediction entails a clinician reviewing whatever information is deemed relevant and making a predictive judgment on the basis of professional training and intuition. Clinical prediction requires an integration of available information about the individual in order to develop "some psychological hypothesis regarding the structure and dynamics of this particular individual."

Feld, *supra* at 543 (quoting P. Meehl, Clinical Versus Statistical Prediction 4 (1954)). Clinical methods rely on the use of trained psychiatric or social science staff. attempting a "wide band procedure in which a broad range of information about the individual is gathered from sources such as interviews, social history and projective testing." Koerin, Violent Crimes, Prediction and Control, 24 Crime & Delinquency 49, 51 (1978). Fashioning the hypothesis about the particular individual is frequently said to be done in terms of diagnostic frame of reference—a scheme of important personal variables that figure in the individual's personality and some sense of the dynamics of the personality. *See e.g.* Kozol, Boucher and Garofalo, The Diagnosis and Treatment of Dangerousness, 18 Crime & Delinquency 371, 384-86 (1972).

Actuarial or statistical prediction, on the other hand

> entails the development of probability relationships between predictor variables, such as age and prior offenses, and the behavior to be predicted—violence. It requires an examination of the individual only to determine the presence of the predictor variables.

Feld, *supra* at 543. In statistical prediction, the individual is, in effect, classified in terms of the presence or absence of

the predictor variables. Given the classification, the frequencies of behaviors can be concluded for persons belonging to the same class. *Id.*

The family court judge's evaluation of a juvenile bears a superficial resemblance to both methods in the sense that it lacks the refinements of each. The judge's assessment could not properly be called a clinical prediction, unless it could be supposed that the judge's experience on the bench and his judgment of human nature substitutes for a clinician's training; his confrontation with the accused juvenile substitutes for a diagnostic interview and examination; and the juvenile's arrest record substitutes for a patient's history. Nor is the evaluation by the judge in any way comparable to a rigorous statistical prediction. In comparison to the large number of variables used in the studies of statistical prediction, apparently very little data is made available to the judge. And, what is presented is crude and unrefined. There is no guarantee that significant information is available to him, or, if it is there, that it is perspicuous. Finally, there is no use of follow up studies to refine and reformulate the statistical prediction method that, implicitly, the family court judge might be said to be using. Accordingly, he would continue to rely on useless or even incorrect data and assign incorrect weight to the various variables utilized.

The literature generally agrees that no reliable method of predicting dangerousness, whether clinical or actuarial in nature, exists at this time. It follows *a fortiori* that the family court judge's opinion, lacking the refinements of each sort of predictive method, is also unreliable. Further, even to the extent that the literature on each type of method

is sometimes optimistic about the prospect of developing a reliable clinical or statistical method, nothing can properly be inferred about the judge's evaluation of juveniles, since the indications of optimism reflect methodological improvements which are not utilized in the judge's determinations.

Thus, it is clear that juveniles who are subjected to § 739 detention have their freedom curtailed by judgments that are untrustworthy and uninformed and without the requisite rationality which due process mandates.

In *Jurek v. Texas*, 428 U.S. 262, 275-6 (1976), an attack on a Texas statute, requiring a jury at the sentencing proceedings following conviction for a capital offense to consider whether the evidence established beyond a reasonable doubt that the defendant would commit criminal acts of violence, that would constitute a continuing threat to society, was rejected in an opinion by Justices Stewart, Powell and Stevens. They said:

> It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. . . . The task that a Texas jury must perform in answering the statutory question at issue is thus basically no different from the task performed countless times every day throughout the American system of criminal

> justice. What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced.

(footnote citations omitted)

The attorney general argues to the same effect, but the views expressed by the Justices in *Jurek* and the argument of the attorney general that courts are constantly engaged in predicting future conduct afford no basis for validating a § 739 determination.

Denial of bail because of a risk of non-appearance is usually made after a hearing which reveals that the defendant is in good health, has no roots in the community, no family ties, is not employed and owns no property, has possible access to financial resources and no recognized attachments which would assure his appearance at trial. A sentence is imposed after full investigation of the defendant's background. The Texas jury in *Jurek*, as in bail and sentencing cases, had all possible relevant information about the defendant, and it had heard evidence adduced at trial and found him guilty beyond a reasonable doubt of an offense for which the defendant could be sentenced to death.

The family court judge in making a § 739 decision knows nothing about the juvenile if he is a first time offender. The judge, of course, has the charges before him, but he also should know that the charges will surely be reduced at probable cause or fact finding. If the juvenile has had prior court contact, the judge knows that he has before him a recidivist, but at that point he does not know the extent of the juvenile's personal involvement, the extent to

which the charges have been inflated and whether probable cause will be found. He must operate on intuition and his personal predilections, the antithesis of reasoned action.

Arbitrary and capricious adjudications that may deprive a juvenile of his freedom because of a feeling that a probation officer and judge have that the juvenile will commit a crime if released—a feeling that is intuitive rather than reasoned—are fundamentally offensive to a concept of ordered liberty in a free society.

Moreover, even aside from the innate inability to support a § 739 order of pretrial detention as a rational or reasoned judgment, the record is replete with § 739 determinations that constitutes arbitrary and capricious action in its crudest and rawest form. Whether the juvenile was a first offender with no prior conduct, whether the court was advised that the juvenile was an obedient son or was needed at home, whether probation intake recommended parole, the case histories in this record disclose that it was not unusual for the court to discount these considerations and order remand based on a 5 to 15 minute evaluation. *See e.g.*, transcript of proceedings in case file histories of Carlos Fargas, Johnny McArthur, Christopher Cox, Glen Maloney, Wade Forde, Francisco Ramos, Jerome Basnight, Jose Cruz.

What seems to be the most patently arbitrary action, however, occurs in those cases in which the juvenile is paroled to the custody of his parents or guardians after the incident, has been home on parole ranging in the case histories in this record from roughly 5 days to over a month prior to the § 739 hearing, and even though there is no

showing of any other infraction while on parole, the judge nonetheless orders remand purportedly because there is a risk that the juvenile will commit a new crime before he is tried on the instant offense. Whatever meager rationale may exist in other situations to warrant ordering the juvenile confined pursuant to a § 739 determination, remand is wholly unjustified and unsupportable in these circumstances, and if the determination could be tested on review, it would surely be set aside as a clear abuse of discretion.

The examples in this record are such as to indicate that a § 739 remand is not unusual even in such cases. For example Carlos Fargas was arrested on April 24, 1979, and paroled to the custody of his parents. His § 739 hearing occurred on June 6, some 43 days later. His mother was sick in the hospital. Nonetheless, he was ordered remanded. Similarly, Luis and Sammy Rosario were charged with involvement in a delinquent act which occurred on March 2, 1978. Both were on parole from March 2 to March 15 when their § 739 hearing took place. Both were remanded. Johnny McArthur was involved in delinquency on October 12, 1977. He was on parole from that date until his § 739 hearing on November 28, 1977. His mother spoke highly of Johnny, but he was remanded. Christopher Cox, Glen Maloney and Wade Forde, along with Clarence Smith and Alex Michael, were involved in an incident on October 13, 1976, and paroled to the custody of their parents. At the § 739 hearing on November 12, in response to a court inquiry, the police officer stated that the boys had not given him any trouble. Smith, who had private counsel, and

Michael were paroled. Cox, Maloney and Forde, however, were remanded. There is nothing in the record to indicate the reason for the difference in treatment. Cox who was 13 was remanded and Michael, who was 15, was paroled. Probation intake had recommended parole for all. None had had any prior record.

Francisco Ramos was charged with a delinquency on March 4, 1978, and was on parole from March 4 to his § 739 hearing on March 17. While this was his 9th arrest and he was on parole on other matters, he had been reporting regularly. Parole was recommended. He was remanded. Jerome Basnight was free on parole for 6 days after his delinquent act, from October 14, 1977, until October 20, 1977. At his § 739 hearing on the latter date, despite this being his first court contact, he was remanded. Jerome Cruz was on parole from March 7, 1977, until his § 739 hearing on March 25, 1977. This was his first court contact, but he was remanded.

Carl Harris and Michael Taylor were free on parole from March 5, 1977, to March 17, 1977; Tyrone Parson was free on parole from November 6, 1976, to December 1, 1976; Daniel Nelson was free on parole from April 19, 1977, to May 3, 1977; and Daniel Gregoire was free on parole from August 23, 1977, to September 20, 1977. Each was remanded. It is conceded that these juveniles had prior court contacts. In the case of Parsons, there had been 7 such contacts, and in the case of Gregoire, 6 such prior contacts, five of which had been dismissed. While evidence of prior delinquency may make remand seem less egregious than the other listed examples, arbitrary use of § 739 power is nonetheless clearly manifest when a juvenile comes to court

days, weeks or more than one month after the charged incident without any showing of any intervening criminal act and is nonetheless remanded because of the court's professed belief that he will commit a crime before the return date. Such determination under those circumstances is both irrational and unreasoned. A statutory scheme that permits an individual's freedom to be restricted pursuant to that kind of irrational behavior must be condemned under the due process clause. *See Kent v. United States, supra; Board of Regents v. Roth*, 408 U.S. 564, 572 (1972).

2. A juvenile subjected to pretrial detention has not as yet had a "judicial determination of probable cause which the Fourth Amendment requires as a prequisite to extended restraint of liberty following arrest." *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975); *Bell v. Wolfish*, 441 U.S. 520, 526 (1979). When a juvenile is arrested and held in custody he must be taken before a family court judge within 24 hours for a § 739 hearing. The judges may postpone the hearing for another 24 hours. No probable cause determination is made before the § 739 hearing. The juvenile at this stage is without counsel until he appears for the § 739 hearing. In some instances he is before the court on a delinquency petition filed on information and belief. That is, the charges in the petition are not verified by someone with direct knowledge of what took place. If ordered remanded, a fact finding hearing must occur 3-6 days thereafter. That hearing may be delayed for as long as 14 days after the § 739 hearing but in such a case a probable cause hearing must be held within 72 hours of the § 739 hearing. Accordingly a juvenile may be held in pretrial detention under a § 739 determination for as long as 5 days prior to

any proceedings being held, neutral or adversary, pursuant to which a judicial determination of probable cause is made.

The burdens of pretrial detention are substantial to impose on a presumptively innocent man, even when there is probable cause to believe he has committed a crime. *Baker v. McCollan*, 443 U.S. 137, 153, (1979) (Stevens, J., dissenting). To allow a state to impose these burdens on a juvenile before the state has taken the initial validating step of establishing its right to restrict the individual's liberty, in order to insure his presence at trial, would seem to be at war with accepted concepts of due process of law.

While not every disability inflicted during pretrial restraint amounts to punishment in the constitutional sense, *Bell v. Wolfish, supra*, 441 U.S. at 537, and there is clearly a distinction between punitive measures, imposition of which the constitution forbids prior to an adjudication of guilt and regulatory restraints that may be permissible, *id.; Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165-167, 186 (1963), the Act at issue here licenses a judge of the family court, acting on an intuitive hunch that the juvenile is probably guilty, to treat an adolescent like a convict until his innocence is established. In a society riddled with violence and fearful of crime, this approach may seem appropriate. Whatever current social imperatives might lead us to wish to deal with the problem of juvenile delinquency on the above basis, the presumption of innocence is ingrained in the fabric of our fundamental law, and the prerogatives § 739 permit contravene guaranties and rights we have long considered fundamental. *See e.g., Ingraham v. Wright.* Pretrial adult detainees held because they could not meet the terms of bail have the presumption of inno-

cence even though there has been a probable cause determination. Such detention has been held to be regulatory, not punitive, *see Bell v. Wolfish*, but juveniles held in pretrial detention present a stronger case of innocence than the adult. There has been no probable cause determination as to them, and "under the Due Process Clause a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Bell v. Wolfish, supra* at 535.

3. When a court pronounces the judgment that a youth must be incarcerated under § 739 because he or she is likely to commit additional crimes if released, the act of incarceration constitutes punishment which cannot constitutionally be imposed prior to an adjudication of guilt. Such a decision to incarcerate offends the due process clause of the 14th Amendment because it is imbued with what have long been recognized as the three essential attributes of punishment: it inflicts a deprivation of a constitutionally protected liberty or property interest; it is officially imposed rather than being the spontaneous act of an errant official, *see Hernandez v. Lattimore*, 612 F.2d 61, (2d Cir. 1979); and it stigmatizes the youthful detainee in a way that associates him with criminal behavior.

Whether a deprivation of liberty or property constitutes "punishment" has often turned on the criminal or noncriminal nature of the behavior for which it is imposed. *Compare Trop v. Dulles*, 356 U.S. 86 (1958) (loss of citizenship for desertion from armed forces held to be punishment) *with Perez v. Brownell*, 356 U.S. 44 (1958) (loss of citizenship for voting in foreign election held not to be punilshment). *See also Lipke v. Lederer*, 259 U.S. 557

(1922); *United States v. LaFranca*, 282 U.S. 568 (1931). In the latter two cases the regulatory or penal character of a tax depended on its "involving the idea of punishment for infraction of the law." 282 U.S. at 572. Similarly, in *Kennedy v. Mendoza-Martinez*, *supra*, the automatic forfeiture of citizenship for draft evaders was held to constitute punishment.

However, "punishment" is not limited to deprivations based on having committed a specific, identifiable crime. It is sufficient if the person is stigmatized as disreputable in a manner closely analogous to the process that occurs upon a formal finding of criminal guilt. In *United States v. Lovett*, 328 U.S. 303 (1946), the termination of employment for government employees "found guilty of disloyalty" was characterized as punishment notwithstanding the absence of any specific law making disloyalty a crime. 328 U.S. at 316. A similar process of stigmatization occurs with juveniles who are incarcerated because of anticipated imminent criminal behavior notwithstanding the court's inability to predict or specify what crimes they will commit.

The sharp distinction between pretrial detention of juveniles § 739 and pretrial detention of adults for failure to meet bail is apparent when we consider the criteria traditionally used to distinguish punitive from regulatory impositions:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is

> already a crime, whether an alternative purpose to which it may rationally be connected is assignable to it, and whether it appears excessive in relation to the alternative purpose assigned. . .

Kennedy v. Mendoza-Martinez, supra, 372 U.S. at 168-69; *also see Bell v. Wolfish, supra,* 441 U.S. at 537-538. Bail is set for adults for the specific purpose of assuring the defendant's appearance at trial, and as such it may not be "excessive." U.S. Const. 8th Amendment. Excessiveness is determined in relation to this specific purpose. A court may not impose higher bail than appears "reasonably necessary" to effectuate the justifying reason for the restraint. *Stack v. Boyle,* 342 U.S. 1 (1951).

In contrast to the rather specific delimited purpose for which bail is set, the purposes of § 739—to protect society from juveniles' criminal conduct—are not sufficiently distinguishable from those of the juvenile justice system as a whole to constitute an "alternative purpose." Moreover, even if they did constitute such, the inability of trial judges to predict which juveniles will commit crimes, *see* discussion *ante* pp. 66a-79a *et. seq.*, means that any given decision to detain cannot "rationally be connected" with the purpose behind it. Thirdly, the stigmatizing of juveniles as prospective or habitual criminals prior to trial is such a departure from basic principles of due process that it "appears excessive" even in relation to the goal of protecting society.

The state cannot escape the obviously punitive nature of detention under § 739 by labelling the statute "preventive" and "regulatory," since "even a clear legislative classification of a statute as 'non-penal' would not alter the

fundamental nature of a plainly penal statute." *Trop v. Dulles, supra,* 356 U.S. at 95. If incarceration under the statute were based exclusively on a founded suspicion that the juvenile had committed crimes, no one would doubt that this constituted punishment. To hold that it is not "punishment" when based on a vague suspicion that the juvenile may commit future crimes would render the applicability of the due process clause in inverse proportion to the arbitrariness of governmental decision-making. The absurdity of such a result is perhaps what inspired Chief Justice Warren to insist that a deprivation did not cease to be punitive because its professed goals were preventive:

> It would be archaic to limit the definition of "punishment" to "retribution." Punishment serves several purposes: retributive, rehabilitative, deterrent—and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment.

United States v. Brown, 381 U.S. 437, 458 (1965). When detention is imposed solely on grounds which are tantamount to a stigma of criminality, this is "punishment" regardless of the label attached, and regardless of whether it is based on past or predicted future acts.

A statutory scheme which empowers the state to have juveniles incarcerated for as long as 5 days without the state having established a justification for their being held surely constitutes a punitive measure offensive to due process requirements.

Accordingly, I hold that placing a juvenile under disability of restraint pursuant to the arbitrary and subjective

evaluation of a judge before the state has been required to show that his being held, even for regulatory reasons, is punitive and in violation of due process.

For these reasons I find § 739(a)(ii), both on its face and as applied, contravenes the rights of petitioners and the class they represent to due process of law as guaranteed by the 14th Amendment to the Constitution of the United States.

IT IS SO ORDERED.

Dated: New York, New York
April 17, 1981[†]

/s/ ROBERT L. CARTER

ROBERT L. CARTER
U.S.D.J.

[†] Filed April 20, 1981.—*Ed.*

APPENDIX D

April 3, 1978 District Court Opinion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 6176 (RLC)

UNITED STATES OF AMERICA, ex rel. GREGORY MARTIN, et al.,

Petitioners,

against

ROBERT K. DAVIS, Director of Detention Services, Human Resources Administration,

Respondent.

[APPEARANCES OMITTED IN PRINTING.]

CARTER, D.J.

OPINION

In this habeas corpus proceeding petitioner, Gregory Martin, seeks to have the action certified as a class action, a declaratory judgment that Section 739(a)(ii) of the Family Court Act ("the Act") violates the due process and equal protection clauses of the 14th Amendment and an order mandating the release of all persons held pursuant to the aforementioned New York statute. Petitioner has

moved to allow this proceeding to go forward as a class action, and the state has filed a motion to dismiss the writ on the ground that petitioner has failed to exhaust state remedies and opposes the motion for class action certification as well.

The complaint in this case was filed on December 21, 1977, and because of the short term duration of pre-trial detention under the Act, the matter was brought on by order to show cause on January 3, 1978. In his papers and at the order to show cause hearing, petitioner addressed himself only to the class certification issue. In its answering memorandum filed on January 11, 1978, the state argues that the class certification motion should be denied and that the writ should be dismissed because petitioner has failed to exhaust state remedies. Petitioner has filed a reply memorandum contravening the state's arguments. Petitioner filed, on March 31, 1978, an amended petition adding two additional parties as petitioners in this action.

Section 739(a) of the Act provides:

> After the filing of a petition under section seven hundred thirty-one or seven hundred thirty-two, the court in its discretion may release the respondent or direct his detention. . . . [t]he court shall not direct detention unless it finds [sic: phrase omitted] that unless the respondent is detained:
>
> . . . .
>
> (ii) there is a serious risk that he may before the return date do an action which if committed by an adult would constitute a crime.

The only issues to be decided at the present time is whether the jurisdictional requisites of 28 U.S.C. § 2254(b)

which require that federal habeas not issue unless the state prisoner has exhausted allowable state remedies have been met; and if the answer to that inquiry is yes, should the action be certified as a class action?

Petitioner Gregory Martin, a 14 year old, has been charged in the Family Court in Bronx County with committing acts which if committed by an adult would constitute crimes of robbery 1 in violation of § 160.15, New York Penal Law; assault 2, in violation of § 120.05, New York Penal Law, and possession of a weapon 2, in violation of § 265.03, New York Penal Law. A probable cause hearing was held on December 19, 1977, and Family Court Judge Joseph A. Duran found that probable cause had been established. Moreover, he also found a substantial probability that petitioner would commit another crime before his trial could be held if he were at liberty. Accordingly, pursuant to § 739(a)(ii) of the Act he ordered petitioner remanded. On December 27, 1977, a fact finding hearing took place and petitioner was found guilty of violating Sections 160.15 and 265.03, New York Penal Law. Sentencing was adjourned until January 13, and petitioner was again remanded.

Petitioner Luis Rosario, a 14 year old, is charged in the Family Court, Kings County, with acts that if committed by an adult would constitute the crimes of robbery 1 in violation of § 160.15, New York Penal Law and assault 2, in violation of § 120.05, New York Penal Law. Petitioner Kenneth Morgan, a 14 year old, is charged in Family Court, Queens County, with acts which would constitute crimes of attempted robbery in violation of § 160.10, New York Penal Law and attempted grand larceny in violation of § 155.30, New York Penal law if committed by an adult. Petitioners

have not been tried on these charges, and under the authority of § 739(a)(ii) of the Act, they have been remanded to the Juvenile Center, Bronx and the Juvenile Center, Queens respectively based upon a prediction by the court that if released, petitioners would commit another crime before their trial could be held.

Jurisdiction

Jurisdiction is invoked pursuant to Title 28, U.S.C. 2241(c) authorizing the issuance of writs of habeas corpus by this court when a prisoner is held in state custody in violation of the Constitution or laws of the United States.

Exhaustion of State Remedies

28 U.S.C. § 2254 limits the authority of the court to issue writs of habeas corpus to those state custody cases where the petitioner has either exhausted all available state remedies, or where there are no available state corrective processes or circumstances render such processes ineffective.[1] Since the threshhold consideration as to whether all available state remedies have been exhausted is a jurisdictional requisite, that issue should be addressed first.

Petitioners argue that the exhaustion of the state remedies requirement within the meaning of *Picard v. Connor,*

1. Section 2254(b) provides:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

404 U.S. 270 (1971) has been met because the Act was specifically held to be free of due process and equal protection infirmities in *People ex rel. Wayburn v. Schupf*, 39 N.Y. 2d 682, 385 N.Y.S.2d 518, 350 N.E. 2d 906 (1976). The state contends, however, that all available state remedies were not exhausted in *Wayburn* since no appeal was taken to the United States Supreme Court from the decision of the New York Court of Appeals and that in any event these petitioners cannot attribute to themselves the pursuit of state remedies taken by someone else (state's brief, pp. 1-8).

Wayburn was an individual action attacking the constitutionality of the Act. When the case reached the New York Court of Appeals, Wayburn was no longer being held in pretrial detention. He had already been tried and sentenced. The Court of Appeals refused to dismiss on grounds of mootness "(b)ecause the situation is likely to recur, . . . and the substantial issue may otherwise never be reached (in view of the predictably recurring happenstance that, however expeditiously an appeal may be prosecuted, fact finding and dispositional hearings normally will have been held and a disposition made before the appeal could reach us)." *Id* at 687. Accordingly, it reached the merits. *Wayburn* explicitly recognizes that pretrial detention as authorized in the Act impinges on fundamental rights. The court subjected the Act to the strict scrutiny test mandated by the United States Supreme Court in situations affecting fundamental rights, *see, e.g., Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969) (voting rights); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to travel); *Harper v. Virginia State Board of Elections*, 383 U.S. 663

(1966) (voting rights), and found a compelling state interest warranting the pretrial detention of juveniles and justifying the differences between the treatment of youth and adults authorized by the Act. Accordingly, the Act was upheld as free of the claimed due process and equal protection deficiencies. No appeal was taken to the United States Supreme Court. Indeed, it is unlikely that an appeal could have withstood a claim of mootness. *See Sosna v. Iowa*, 419 U.S. 393, 403 (1975): "There must not only be a named plaintiff who has . . . a case or controversy at the time the complaint is filed, and at the time the class action is certified by the District Court pursuant to Rule 23, but there must be a live controversy at the time this Court reviews the case." (footnotes omitted).

The exhaustion doctrine is firmly grounded in considerations of federal-state comity. It is clear, however, that § 2254 was not designed to "erect insuperable or successive barriers to the invocation of federal habeas corpus. The exhaustion requirement is merely an accommodation of our federal system designed to give the State an initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights." *Wilwording v. Swenson*, 404 U.S. 249-251 (1971), *quoting Fay v. Noia*, 372 U.S. 391, 438 (1963). All that is necessitated "is that the state courts must have had a 'fair opportunity' to consider a constitutional claim before federal habeas is available under the exhaustion doctrine." *United States ex rel. Leeson v. Damon*, 496 F.2d 718, 721 (2d Cir.), *cert. denied* 419 U.S. 954 (1974). It is regarded as placing needless stress on federal-state relations and as hence unseemly for a federal

court to upset a state court conviction without the state courts being first afforded the opportunity to pass upon the contentions which allegedly warrant release on federal habeas corpus.

Wayburn is an authoritative and unanimous holding of New York's highest court. All the judges on that court agreed that the state had a sufficiently compelling state interest in the guardianship of its youth to justify the promulgation of a law which permits youth to be held in pretrial detention on a prediction that if released the youth might commit another crime before he could be brought to trial. There have been no intervening decisions by the New York Court of Appeals or the United States Supreme Court to warrant any expectation that *Wayburn* no longer reflects the law of New York. Since we already have an authoritative state determination on the federal claims raised here which reflects the current status of New York law, exhaustion of state remedies by these petitioners would seem to be an exercise in futility. *See Stubbs v. Smith*, 533 F.2d 64 (2d Cir. 1976); *Johnson v. Robinson*, 509 F.2d 395, 397 (D.C. Cir. 1974); *United States ex rel. Sero v. Preiser*, 506 F.2d 1115, 1130 (2d Cir. 1974), *cert. denied*, 421 U.S. 921 (1975); *Mercado v. Rockefeller*, 502 F.2d 666 (2d Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); *Sarzen v. Gaughan*, 489 F.2d 1076 (1st Cir. 1973); *Layton v. Carson*, 479 F.2d 1275 (5th Cir. 1973); *United States ex rel. Hughes v. McMann*, 405 F.2d 773 (2d Cir. 1968); *Evans v. Cunningham*, 335 F.2d 491 (4th Cir. 1964); *Gesicki v. Oswald*, 336 F. Supp. 371, 374 n.3 (S.D.N.Y. 1971) (Kaufman, C.J.), *aff'd without opinion*, 406 U.S. 913 (1972).

Appendix D

The state argues that the authority of the above cited cases is inapposite since in *Wayburn* the state appeal process was terminated prior to completion in that no appeal was sought in the United States Supreme Court. *Ex parte Hawk*, 321 U.S. 114 (1944) is relied on for the view that resort to the United States Supreme Court on direct appeal is necessary before exhaustion of the state process can be said to have been completed (State brief, pp. 4-9). This was certainly the law through *Darr v. Burford*, 339 U.S. 200 (1950). In *Fay v. Noia*, 372 U.S. 391 (1963), however, the Court rejected that position. In discussing the reach of federal habeas corpus first extended to state prisoners by the Judiciary Act of 1867, the Court stated that the extension of federal habeas corpus to state custody cases "seems plainly to have been designed to furnish a method additional to and independent of direct Supreme Court review of state court decisions" (*Id.* at 416), and *Darr v. Burford*, insofar as it was thought to bar a state prisoner from federal habeas corpus relief if he has failed to seek certiorari in the United States Supreme Court, was overruled. *Id.* at 436.

While *Fay v. Noia* has been severely limited by *Wainwright v. Sykes*, —— U.S. —— 97 S. Ct. 2497 (1977), its holding that the exhaustion doctrine does not require seeking certiorari in the United States Supreme Court for direct review of the state court decision as a necessary prerequisite to federal habeas corpus was not affected. *Wainwright* dealt principally with state procedural defaults which were held to afford adequate state grounds for denial of federal habeas corpus relief unless "a showing of cause for the

noncompliance and some showing of actual prejudice resulting from the alleged constitutional violation" (97 S.Ct. at 2505) is made. *Darr v. Burford* was not resurrected. Indeed, the writ has been consistently allowed without direct review by the Supreme Court on certiorari. *See Francisco v. Gathright*, 419 U.S. 59 (1974); *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Peters v. Kiff*, 407 U.S. 493 (1972); *Wilwording v. Swenson*, 404 U.S. 249 (1971).

The state concedes the validity of this argument insofar as certiorari is concerned but argues a different principle is applicable when review by the Supreme Court may be had on direct appeal. There is no logical basis for requiring an appeal as a requisite to a right to federal habeas corpus relief while there is no such necessity in respect of certiorari. The reason for not mandating that certiorari be sought first as part of the exhaustion requirement before federal habeas relief can be entertained is that this procedure was found to be neeedlessly time consuming and burdensome. Since federal-state comity can be satisfied without imposing this needlessly formalistic structure, the requirement was abandoned.

In discussing this issue, the Court in *Fay v. Noia* stated:

> "It is also true Ex parte Hawk . . . intimated in *dictum* that exhaustion might comprehend seeking certiorari here . . . But that passing reference cannot be exalted into an attribution to Congress [in respect of § 2254] of a design patently belied by the unequivocal statutory language.
>
> The rationale of Darr v. Burford emphasized the values of comity between the state and federal courts, and assumed that these values would be realized by

requiring a state criminal defendant to afford this Court an opportunity to pass upon state action before he might seek relief in federal habeas corpus. But the expectation has not been realized in experience. On the contrary the requirement of Darr v. Burford has proved only to be an unnecessarily burdensome step in the orderly processing of the federal claims of those convicted of state crimes.

. . . .

. . . The requirement that the habeas petitioner exhaust state court remedies available to him when he applies for federal habeas corpus relief gives state courts the opportunity to pass upon and correct errors of federal law in the state prisoner's conviction. And the availability to the States of eventual review on certiorari of such decisions of lower federal courts as may grant relief is always open. Our function of making the ultimate accommodation between state criminal law enforcement and state prisoners' constitutional rights becomes more meaningful when grounded on the full and complete record which the lower federal courts on habeas corpus are in a position to provide." 372 U.S. at 436-38.

Federal-state accommodation is fully met when the petitioner has presented the federal claims and exhausted all available state remedies in the state courts in respect to them, giving the state the first opportunity to take corrective action. To require direct review by the Supreme Court puts form before substance. Since there is no rational basis to require direct appeal while not requiring certiorari, the court holds that *Wayburn* satisfies in all respects the exhaustion requirements which the petitioners must meet.

Appendix D

Class Action Determination

Class action certification is clearly permissible in federal habeas corpus proceedings. *Gerstein v. Pugh,* 420 U.S. 103 (1975). While full application of the federal rules of civil procedure is not appropriate, the court may "fashion expeditious methods of procedure in a specific case." *United States ex rel. Sero v. Preiser, supra,* 506 F.2d at 1125. As in *Sero,* there are unusual circumstances which warrant allowing this matter to proceed as a class action. The issue raised is a narrow one—may the state subject its youth to pretrial detention on the prediction of a probability that the youth is likely to commit another crime before he can be brought to trial? Only youths may be subject to such a deprivation of their freedom before being adjudged guilty of a criminal offense in some state court proceedings. There is, therefore, a question of law and fact common to the class, and the claims asserted here are typical of the claims of the class. Because of the relative short duration of the pretrial detention authorized by the Act, each member of the putative class if he proceeds on an individual basis, is faced with the prospect of having his claims become mooted before final adjudication in federal habeas corpus proceedings. Yet the class is large, although indeterminate.

The 22nd Annual Report of the Administrative Board of the Judicial Conference for the year 1977 at Tables 80 and 81, pages 162-165 provides statistics showing statewide that in 1976, 58 girls were held in custody before petitions were filed charging them with juvenile delinquency, and 278 girls were held between the filing of the petition and disposition for periods ranging from 1-7 days (111), 8-14

days (44), 15-21 days (23), 23-30 days (29), 31-90 (55), 91-180 days (12), 181-365 days (3), to more than a year (1). 459 boys were held in custody before petitions were filed charging them with juvenile delinquency, and 2,813 boys were held between the filing of the petition and disposition in periods ranging from 1-7 days (1166), 8-14 days (502), 15-21 days (271), 22-30 days (250), 31-90 days (476), 91-180 days (115), 181-365 days (30) to over a year (3). These statistics relate to pre trial detention based on a finding that the juvenile, if at liberty, is not likely to appear at trial, and a finding that he is likely to commit another crime, if at liberty, before he can be brought to trial. The report does not separate the two classes of pretrial detention.

The figures show that overall in 1976, some 517 youths, both girls and boys, were held in pretrial detention before any charge was levied, and that 3,091 youths, again both girls and boys, were held in pretrial detention between the filing of the petition and disposition which is the category to which petitioner's case belongs.

Attached to petitioners' brief in support of the motion for class action certification is a list of cases of pretrial detention of juveniles, based on a prediction that if at liberty the juvenile was likely to commit another crime before he could be brought to trial, handled by the Legal Aid Society of the City of New York, Juvenile Rights Division which handles 95% of all juveniles accused of being delinquent in the City of New York. Listed are some 18 such cases in 1977.

These specific cases occur, therefore, with some frequency. Joinder is obviously impracticable, and because of the special circumstances presented which render it unlikely that the claims raised here can be considered and decided in individual cases before the juvenile's pretrial detention has ended, 18 such cases meets the test of numerosity.

Petitioner in this action is being represented by lawyers for the American Civil Liberties Union, and the Legal Aid Society of New York. Such representation assures the interests of the class will be fairly and adequately represented and vigorously prosecuted. Therefore, there has been substantial compliance with the requirements of Rule 23, F.R. Civ.P. Accordingly, the matter may proceed as a class action, that is, on behalf of all juveniles who are now being held or will be held before these proceedings are concluded, in pretrial detention under § 739(a)(ii) of the Act.

IT IS SO ORDERED.

Dated: New York, New York
April 3, 1978[†]

/s/ ROBERT L. CARTER

ROBERT L. CARTER
U.S.D.J.

[†] Filed April 4, 1978.—*Ed.*

APPENDIX E

Notice of Appeal for Intervenor-Appellant

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Nos. 81-2175, 81-2193

GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, and all others similarly situated,

Petitioners-Appellees,

against

PAUL STRASBURG, as Commissioner of the New York City Department of Juvenile Justice,

Respondent-Appellant,

ROBERT ABRAMS, as Attorney General of the State of New York,

Intervenor-Appellant.

PLEASE TAKE NOTICE that the Intervenor-Appellant, ROBERT ABRAMS, as Attorney General of the State of New York, hereby appeals to the Supreme Court of the United States pursuant to 28 U.S.C. § 1254(2) from a judgment of the United States Court of Appeals for the Second Circuit, entered on September 20, 1982, which affirmed a

judgment of the United States District Court for the Southern District of New York declaring New York Family Court Act § 739(a)(ii) unconstitutional, and from each and every part thereof.

Dated: New York, New York
October 19, 1982[†]

[Addressees Omitted in Printing.]

Robert Abrams
Attorney General of the
State of New York
By:
/s/ Judith A. Gordon

Judith A. Gordon
Assistant Attorney General
Intervenor-Appellant, Pro Se
Two World Trade Center
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(212) 482-2462

[†] Filed on October 20, 1982.—*Ed.*

APPENDIX F

Notice of Appeal for Appellant

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Nos. 81-2175, 81-2193

GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, and all others similarly situated,

Petitioners-Appellees,

v.

PAUL STRASBURG, as Commissioner of the New York City Department of Juvenile Justice,

Respondent-Appellant,

ROBERT ABRAMS, as Attorney General of the State of New York,

Intervenor.

Notice is hereby given that PAUL STRASBURG, the respondent above-named, hereby appeals to the Supreme Court of the United States from the final judgment of this Court entered in this action on September 20, 1982, which affirmed a judgment of the United States District Court for the Southern District of New York (Carter, J.), en-

tered on June 1, 1981, declaring New York Family Court Act, section 739(a)(ii), unconstitutional.

This appeal is taken pursuant to 28 U.S.C. section 1254(2).

FREDERICK A. O. SCHWARZ, JR.
Corporation Counsel of the
City of New York
Attorney for Respondent-Appellant[†]

[†] Filed on December 3, 1982.—*Ed.*